No. 87-312

Supreme Court, U.S.
FILED
AUG 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOHN ROBERT DUNCAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does an individual have a right contained within the First, Fourth, Ninth and Fourteenth Amendments of the United States Constitution and the decisions of this Court to possess child pornographic materials in the privacy of his home without any intent to show, distribute or disseminate such material to any other person?

2. Can a state, consistent with the First, Fourth, Ninth and Fourteenth Amendments of the United States Constitution and the decisions of this Court make criminal the act of duplicating an existing photograph of a child engaged in sexual conduct without any showing or proof that the individual making the duplicate intended to display the original or the duplicate to any other person?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, John Robert Duncan, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, denying peti-

tioner's application for writ of habeas corpus. In his application for writ of habeas corpus, petitioner had prayed that a statute contained in the California Penal Code, making criminal the act of the duplication of existing child pornographic material entirely within the limits of his own home and without the intent to distribute or display such materials or duplicates to any other persons was, and is, an unconstitutional infringement of petitioner's rights of privacy. Petitioner sought rehearing in the Court of Appeal and review by the Supreme Court of the State of California and was, in each case, denied. This petition follows.

OPINIONS BELOW

The opinion of the Court of Appeal appears In Appendix "A" attached to this petition. It is also published as In re

Duncan (1987) ___ Cal. App. 3d ___, ___ Cal. Rptr. ____. As set forth in the Statement of the Case, infra, the decision of the Court of Appeal followed the affirmance of the judgment of conviction by the Appellate Department of the Superior Court, which Opinion and Judgment is attached hereto as Appendix "B". Petitioner's subsequent application to the Superior Court for writ of habeas corpus was denied thereby in a Memorandum of Decision, a copy of which is attached hereto as Appendix "C". Denial of a petition for writ of habeas corpus is not appealable in California, Gardner vs. California (1969) 393 U.S. 367, 368, 89 S. Ct. 580, California Penal Code section 1506, and petitioner accordingly filed a new petition in the Court of Appeal, Second District. Division Three of that court issued its order, attached hereto

as Appendix "D", transferring the matter to itself for hearing and decision. A copy of the Court of Appeal's order denying rehearing is attached as Appendix "E", and a copy of the California Supreme Court's Order Denying Review is attached as Appendix "F". A copy of the remittitur issued by the Court of Appeal is attached as Appendix "G". Finally, a copy of the order issued by the Municipal Court of Los Angeles, Southeast/South Judicial District, releasing petitioner on his own recognizance pending the outcome of the instant proceedings is attached as Appendix "H".

JURISDICTION

The judgment of the Court of Appeal of the State of California, Second Appellate District, Division Three, was filed on March 3, 1987. A timely Petition for Rehearing was denied by the Court of

Appeal on March 30, 1987. Thereafter, a timely Petition for Review was filed in the Supreme Court of the State of California, which was denied on June 25, 1987. Where the highest state court having jurisdiction to review a decision of a lower state court refuses to do so, the time for petitioning this Court for a writ of certiorari runs from the date of refusal to review, American Railway Express Co. vs. Levee (1923) 263 U.S. 19, 20-21. This petition is filed within 60 days of the date the California Supreme Court denied review and, as a consequence, is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ." United States Consti-

tution, Amendment I.

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." United States Constitution, Amendment IV.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." United States Constitution, Amendment IX.

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ." United States Constitution, Amendment XIV, Section 1.

"A person is guilty of sexual exploitation of a child when he or she knowingly knowingly develop (sic), duplicate (sic), print (sic), or exchange (sic) any film, photograph, video tape, negative, or slide in which a person under the age of 14 years engaged in an act of sexual conduct." California Penal Code section 311.3, subdivision (a).

STATEMENT OF THE CASE

In the Southeast/South Judicial Distict of the Municipal Court of Los Angeles, California, petitioner suffered conviction of two counts of violation of California Penal Code section 311.3(a).[1] Petitioner was sentenced to consecutive

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1. California Penal Code section 311.3(a) provides, in pertinent part, as follows: "A person is guilty of sexual exploitation of a child when he or she knowingly . . . duplicate (sic) . . . any film, photograph, . . . in which a person under the age of 14 years engaged in an act of sexual conduct."

one-year terms in the county jail, the maximum time of incarceration permitted by law.[2] Petitioner filed a timely Notice of Appeal to the Appellate Department of the Superior Court in and for the County of Los Angeles. In his appeal, petitioner asserted only that the evidence at trial was insufficient to sustain the judgment and that the facts were sufficient to compel a finding of entrapment as a matter of law. The Superior Court, on October 1, 1985, affirmed the judgment and petitioner, in pro per, thereupon applied to the court for a writ of habeas corpus. On February 5, 1986,

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2. Violation of Penal Code section 311.3(a) is a misdemeanor, punishable by a maximum of one year in the county jail, a fine of $2,000, or by both such fine and imprisonment. A second or any subsequent conviction under the section is a felony, Penal Code section 311.3(d), punishable by up to three years in the state prison, Penal Code section 18.

the Superior Court appointed present counsel for petitioner and thereafter, on March 21, 1986, petitioner filed a Supplement to Petition for Writ of Habeas Corpus and therein challenged, for the first time, the constitutional validity of the section.

The Superior Court issued its Order to Show Cause why the application of petitioner should not be granted and, after hearing, on or about June 25, 1986, upheld the constitutionality of the statute and denied the writ. On August 8, 1986, petitioner prosecuted a new Petition for Writ of Habeas Corpus to the Court of Appeal of the State of California, Second Appellate District, Division Three. In his petition to the Court of Appeal, petitioner sought a decision by that court that the section [Penal Code section 311.3(a)] is facially defective

and unconstitutional in its application to petitioner under the First, Fourth and Fourteenth Amendments of the United States Constitution and Article I, sections 1, 2 and 15 of the California Constitution. In particular, petitioner urged the vulnerability of the statute as an unconstitutional interference with the right of privacy. Petitioner raised further issues, not here reasserted, relating to competency of counsel, sufficiency of the evidence, and abridgement of Fifth and Eighth Amendment rights in the imposition of sentence. By its action of August 21, 1986, the Court of Appeal ordered the cause transferred to itself for hearing and decision to settle important questions of law. A copy of said order is attached hereto as Appendix "D". Following a hearing and argument, the Court of Appeal denied the writ,

March 3, 1987. The court held, in substance, that the statute at issue was within the guidelines concerning legislation designed to control child pornography set forth by this Court in New York v. Ferber (1982) 458 U.S. 747, 764-765, 73 L. Ed. 2d. 1113, 102 S. Ct. 3348 and, in light of the compelling intent of the state in the protection of children from exploitation, the section does not interfere with the ". . . constitutional rights of free expression and privacy. . . [and] is neither overbroad nor invalid as applied to petitioner." Appendix "A", p. 18. A true and correct copy of the opinion of the Court of Appeal is attached hereto as Appendix "A" and is also reported as In re Duncan (1987) ___ Cal. App. 3d ___, ___ Cal. Rptr. ____. Petitioner filed a timely Petition for Rehearing in the Court of

Appeal which was denied, Appendix "E" attached hereto, and on April 13, 1987, filed his Petition for Review in the Supreme Court of the State of California.

The Supreme Court, on June 25, 1987, denied the Petition for Review, Appendix "F" attached hereto, and the remittitur from the Court of Appeal issued on July 13, 1987, Appendix "G" attached hereto.

On or about July 31, 1987, petitioner, by his attorney, advised the Municipal Court, the Honorable John R. Hopson, Judge, of his intent to petition the United States Supreme Court for review by way of a writ of certiorari. On receipt of a "time waiver" executed by petitioner, Judge Hopson entered his order that petitioner could remain free of custody until September 22, 1987, or until the matter was finally resolved by this Court, see Appendix "H" attached

hereto.

STATEMENT OF FACTS

On or about July 18, 1983, officer William Dworin of the Los Angeles Police Department obtained a warrant, number 20778, duly executed by a judge of the Municipal Court, to conduct a search of petitioner's home, automobile and person. The warrant issued on presentation by the officer of a sworn affidavit in support thereof which contained, inter alia, a copy of a letter from petitioner expressing his interest in children and pedophilia and explaining how ". . . cheap copies of polaroids [could be made] from a Super Shooter which has an attachment for making copies."

Police executed the warrant on July 19, 1983, and following a search of petitioner's home recovered various items including a polaroid camera with copying

lens (i.e., a "Super Shooter") and numerous photographs of children under the age of 14 years engaged in sexual conduct. Three of these photographs, apparent copies of other photographs, were, based upon the date of manufacture of the polaroid film, taken some date after February, 1983. Four additional photographic copies, again based only upon the date of manufacture of the film, were taken some date after April, 1983. Petitioner was immediately taken into custody and thereafter, on July 20, 1983, a criminal complaint issued charging petitioner with two counts of violation of Penal Code section 311.3, subdivision (a) in that he did ". . . willfully, unlawfully, and knowingly photograph, develop, duplicate, print, or exchange any film, photograph, videotape, negative or slide in which a person under the age

of 14 years is engaged in an act of sexual conduct," on or about ". . . February, 1983" [count I] and on or about ". . . April, 1983" [count II]. The seven photographs recovered from the search formed the basis of the two counts.[3]

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3. Petitioner does not now, nor has he ever, asserted a First Amendment right in the content of any of the photographs nor does he now, nor has he ever, challenged the definition of "sexual conduct" contained in the statute:

". . .

"(b) As used in this section 'sexual conduct' means any of the following:

"(1) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals.

"(2) Penetration of the vagina or rectum by any object.

"(3) Masturbation, for the purpose of sexual stimulation of the viewer.

"(4) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer.

"(5) Exhibition of the genitals, pubic or rectal areas of any person for the purpose of sexual stimulation of

(Continued to next page)

Following the denial of his motion to suppress evidence and/or traverse and quash the warrant,[4] petitioner waived

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Footnote 3 continued

the viewer.

"(6) Defecation or urination for the purpose of sexual stimulation of the viewer. . ."

See New York vs. Ferber (1982) 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348. Petitioner's sole challenge embodies the right to possess such photographs in the privacy of his home and for whatever solitary benefit he receives from them.

4. Petitioner, prior to trial, filed a motion to suppress evidence pursuant to California Penal Code section 1538.5 and, in the alternative, to traverse and quash the warrant. An evidentiary hearing was held on October 12, 1983, in which petitioner sought only to challenge the execution of the warrant, i.e., failure to comply with the "knock and announce" dictate of Penal Code section 844. The trial court denied the motion. Petitioner did not question the sufficiency of the warrant on appeal but raised the issue directly in his application for writ of habeas corpus to both the Superior Court and to the Court of Appeal, and indirectly by urging inadequate counsel because of the failure to challenge the facial validity of the warrant. Both the Superior Court and the Court of

(Continued to next page)

jury and was tried by the court without a jury. Petitioner was duly found guilty on both counts and received consecutive one-year terms of confinement in the Los Angeles County Jail.

By way of appeal, his applications for writ of habeas corpus and/or his Petition for Rehearing in the Court of Appeal and for review in the California Supreme Court (see Statement of the Case, supra), petitioner has challenged the sufficiency of the evidence to sustain

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Footnote 4 continued

Appeal have rejected petitioner's claim and the arguments are not reiterated here. Accordingly, petitioner concedes that if his conduct complained of, to wit: the making of photographic duplicates of existing photographs in one's home entirely for his own use and purpose and without any intent to show or distribute them to another person is not contained within the right of privacy as argued in this petition, no valid challenge to the sufficiency or execution of the warrant exists.

his conviction; the adequacy of counsel at both trial and on appeal; the facial sufficiency and manner of execution of the search warrant; the vagueness and uncertainty of the statute permitting arbitrary enforcement in derogation of Fifth, Eighth and Fourteenth Amendment guarantees; and the validity of the statute in the context of an unconstitutional infringement of petitioner's right of privacy as set forth in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the Constitution of the United States and as determined and defined in the rulings of this Honorable Court.

The interference with the right of privacy is the issue presented in this petition.

HOW THE FEDERAL QUESTION IS PRESENTED

Petitioner has been charged with, convicted of and sentenced to a term of confinement for the act of making copies of photographs already in his possession in the privacy of his own home and without any intent to disseminate, distribute or display the original photographs or any copies thereof to another person. The statutory scheme in California relating to control of obscene matter is contained in Part 1, Title 9, Chapter 7.5, of the California Penal Code sections 311 et seq. Nothing in the code prohibits the mere possession of obscene materials. The statute here at issue, California Penal Code section 311.3(a), prohibits, inter alia, the knowing duplication of any photograph in which a child under the age of 14 years is shown to be engaged in an act of sexual conduct.

Petitioner willingly concedes that the materials he duplicated are not entitled to First Amendment protection and further concedes that the act of making photographic duplicates of such materials is not protected by the Constitution as a form of free speech or expression. But the right of privacy, the right to do whatever one wishes to do entirely within the perimeter of one's own home, free from the intervention, direction or control of the state, emanates from the First, Fourth, Ninth and Fourteenth Amendments of the United States Constitution, and this right of privacy is violated by the statute at issue.

If the instant case involved adult pornography,[5] it is asserted that this

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5. As used herein, the term "adult pornography" refers to visual or other materials relating to sexual acts

(Continued to next page)

Court would uphold the constitutional right of an individual to do the prohibited act if he did so solely in the privacy of his home and without any intent to distribute the product to another person. The right of privacy in such a case, the ". . . right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society." Stanley vs. Georgia (1969) 394 U.S. 557, 564, 89 S. Ct. 1243, 1247.

Footnote 5 continued

involving adults. "Child pornography" refers to such materials relating to participation of children. Laws associated with the restraint of adult pornography require a determination that the matter is obscene (Miller vs. California (1973) 413 U.S. 15, 93 S. Ct. 2607) while those associated with child pornography are not so restrained, New York vs. Ferber, supra. There are ample laws and reasons for limiting the right to distribute or disseminate any kind of pornography to children, cf. California Penal Code section 311.2 et seq.

I

THE STATE CANNOT CONSTITUTIONALLY PROSCRIBE THE POSSESSION OF CHILD PORNOGRAPHY OR ANY OTHER OBSCENE MATERIALS IN THE PRIVACY OF ONE'S HOME ABSENT PROOF OF AN INTENT TO EXHIBIT, DISTRIBUTE OR OTHERWISE PUBLISH THE MATERIALS TO ANOTHER.

The California statute does not charge, and petitioner has not been charged with, the mere possession of child pornography in the privacy of his home. His offense, and the admitted aim of the statute, concerns the knowing duplication of preexisting photographs of children engaged in sexual conduct, the possession of which is not proscribed by statute. Petitioner opines, however,

that the right of the state to prohibit mere possession must be answered to resolve the questions here presented: If the state can constitutionally criminalize mere possession, certainly the act of duplicating that possessed would likewise be proscribed. Petitioner urges herein that the converse also follows: If mere possession in the privacy of one's home is a protected interest under the right of privacy, the act of duplicating an otherwise unprotected visual image is, or should be, similarly included.

Petitioner asserts that it is essential for this Court to decide whether an individual has a right protected by the Constitution to keep, possess or maintain materials which are not entitled to First Amendment protection within the privacy of his own home without any intent, plan

or purpose of displaying, showing or distributing the materials to any other person. Petitioner contends that the right to privacy, recognized by this Court in Stanley vs. Georgia (1969) 394 U. S. 557, 89 S. Ct. 1243 is fundamental and exists even though the material possessed or viewed is not of a nature as to be entitled to First Amendment protection. In Stanley, the appellant was convicted of violating a Georgia statute making criminal the mere possession of obscene material. The materials, three reels of film, were found in the bedroom of the accused's home during a search for bookmaking materials. There was no evidence or indication that appellant possessed the films for any reason other than his own use in the privacy of his home. The Court held:

> "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." At p. 565.

In New York vs. Ferber (1982) 458 U. S. 747, 73 L. Ed. 2d. 1113, 102 S. Ct. 3348, the Court considered the constitutionality of a statute aimed at the eradication of the promotion of sexual performances of children by prohibiting the distribution of photographs of such performances. The Court held that the states are entitled to greater leeway in the regulation of pornographic depictions of children than other forms of pornography thereby relieving the state from establishing that the conduct portrayed meets the standard for obscenity set

forth in Miller vs. California, supra. In substance, the Court recognized the compelling interest of the state in safeguarding the well-being of children (at pp. 756-758); recognized that children, in fact, suffer sexual abuse not only during and as a consequence of the performance but later by the distribution of the printed record thereof (at pp. 759-761); that the commercial nature of the sale of child pornography tends to perpetrate conduct which is illegal throughout the nation (at pp. 761-762); that any value incident to the freedom of expression associated with ". . . permitting live performance and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest if not de minimis" (at p. 762); and the classification of child pornography as outside the protection of the First

Amendment is not incompatible with earlier rulings of the Court.

Ferber had nothing to do with the right of privacy whether the constitutional protection thereof springs from the First, Fourth or Ninth Amendments. While it is clear that the Court in Ferber did not intend to extend First Amendment protection to child pornography and it seems equally clear that the Court endorses or will endorse activities by the states directed toward the elimination or reduction of the sexual exploitation of children, there is nothing in the Court's decision which suggests that the Court intended to allow the states to adopt laws which substantially interfere with the rights of any individual to be secure in the privacy of his own home.

Petitioner recognizes that the Court has heretofore indicated that the right

of privacy recognized in Stanley is not unbounded. Thus, in Bowers vs. Hardwick (1986) 478 U.S. --, 106 S. Ct. 2841, the Court upheld a Georgia statute making criminal the act of sodomy beween consenting adult males in the privacy of their home. The Court held that there was no fundamental right conferred by the Constitution to permit homosexuals to engage in sodomy and the rights advanced by the homosexuals were neither supported by the text of the First or the Fourteenth Amendments. Inasmuch as the Stanley decision ". . . was firmly grounded in the First Amendment," no right of the homosexuals to privacy was recognized by the majority.

In the instant case, petitioner has anchored his claim to the right of privacy in the First and Fourth Amendments as made applicable to the states under

the due process clause of the Fourteenth Amendment. Petitioner urges the analysis of Stanley advanced by Justice Blackmun in dissent in Bowers vs. Hardwick, supra:

> ". . . Stanley rested as much on the Court's understanding of the Fourth Amendment as it did on the First. Indeed in Paris Adult Theater I v. Slater, (1973) 413 U. S. 49, 93 S. Ct. 2628, . . . reliance on the Fourth Amendment not only supported the Court's outcome in Stanley but actually was necessary to it: 'If obscene material . . . carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide Stanley on the narrow basis of "privacy of the home," . . .'", at 106 S. Ct. 2852, 2853

It may be noted that the Supreme Court of Ohio, in Ohio vs. Meadows, (1986) 28 O. St. 3d. 43, 503 NE 2d. 697, cert. den., (1987) ___ U.S. ___, 107 S. Ct. 1581, has determined that the fact that

child pornography is not entitled to First Amendment protection is sufficient to let the state balance the competing interests of the individual to privacy and the state's compelling desire to protect children in upholding a statute prohibiting mere possession of visual depictions of children engaged in sexual activity. The Ohio Court majority essentially read this Court's decision relating to the right of privacy as announced in Stanley to apply only to adult pornography, i.e., representations of adults engaged in sexual acts, and, as a consequence, the decision was not necessarily applicable to child pornography. It went on to note that this Court approved the greater leeway of the states set forth in Ferber in combating sexual exploitation of children. Thus, the Ohio statute, making criminal the mere possession of

child pornography, was not contrary to the dictates of Stanley, was within the legitimate exercise of the police power recognized in Ferber, and was, as a consequence, not unconstitutional.

Petitioner avers that the great difficulty with the reasoning advanced by the Ohio Supreme Court is that it essentially renders Stanley vs. Georgia meaningless: Where this Court recognized that the state's broad power to regulate obscenity does not extend to mere possession in the privacy of an individual's home, the greater leeway approved by this Court in Ferber permits the states to do just that. In legal effect, one type of printed material which is not entitled to First Amendment protection enjoys less protection under the First Amendment than another.

Petitioner recognizes that the

Stanley footnote, fn. 11, contains an exception to the right of privacy expressly recognized in the decision. Surely nothing in the decision should immunize the private retention of dangerous or volatile materials or even, as recognized, the private possession of materials which are entirely lawful. But there is a substantial difference between the possession of a photographic duplicate of an existing photograph of a child engaged in sexual conduct and the fostering or participation in the act or conduct from which the photographic reproduction was produced. The simplistic view that the photograph depicts ". . . felonious conduct being perpetuated upon children. . ." (Justice Wright, concurring in Ohio vs. Meadows, 503 NE 2d. at p. 711 et seq) and is, accordingly, equally culpable cannot be consti-

tutionally sustained.

The right of privacy is fundamental and is separate and distinct from the nature of the materials sought to be privately retained. Accordingly, while the value of any obscene or pornographic material may be modest or de minimis or, indeed, nonexistent, the right to possess such materials, or view them, or do whatever solitary thing one wants to do with them solely and entirely within the privacy of one's own home has enormous constitutional dimensions.

Petitioner does not seek to justify his possession of child pornographic materials; he seeks to justify the unalienable right to do as he wishes in the privacy of his home free from the intrusion of government.

II

REPRODUCTION OF AN EXISTING PHOTOGRAPH IN THE PRIVACY OF ONE'S OWN HOME WITHOUT ANY INTENT TO DISTRIBUTE THE ORIGINAL OR THE REPRODUCTION COPY THEREOF IS ALSO WITHIN THE CONSTITUTIONAL RIGHT OF PRIVACY.

If the mere possession of child pornographic material in the privacy of one's home is not illegal and, moreover, cannot be constitutionally forbidden as an abridgement of the right of privacy, the act of a person making a copy of an existing photograph must likewise be entitled to constitutional protection under the right of privacy. Surely if a person duplicates a photograph with the intent or for the purpose of selling it,

or trading it with another, or even showing or displaying the copy to another, the right of privacy recognized in Stanley would not apply. But if the purpose in making a duplicate is solely and only for the individual's subjective desires, no matter how warped or deviant they may be,[6] the right of privacy emanating from either or both of the First and Fourth Amendments must insulate the activity.

This Court, in Bowers vs. Hardwick, supra, held that there is no constitutional right for homosexuals to engage in

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6. Indeed, if the purpose of the individual in keeping or maintaining child pornographic materials is a product of a mental disease or disability, i.e., pedophilia, it might be argued that any punishment would be questionable on Fifth and Eighth Amendment grounds. The law simply does not punish people for being sick, Robinson v. California (1962) 370 U.S. 660, 82 S. Ct. 1417, cf. Powell vs. Texas (1968) 392 U.S. 514, 88. S. Ct. 2145.

sodomy, even if both the actors are adults and both consent. The Court ruled that the activity is or could be repugnant to the majority of the citizens of the state and contained no elements of the First Amendment entitling it to protection when accomplished in the privacy of one's home. It is difficult to imagine the limits of the Court's reasoning: It is not unthinkable that a community or state might condemn the practice of masturbation. Surely it is an activity which is ordinarily forbidden in public, photographic reproductions of persons doing it are arguably obscene, and the mind-set of the person engaging in the practice may involve fantasies of extremely immoral, illegal or antisocial conduct, e.g., adultery, rape, incest, or whatever. Petitioner suggests that the act of masturbation, like the act of

sodomy between homosexuals, is devoid of any protection per se in the Constitution of the United States. It is, however, extremely unlikely that this or any court would interfere with the right or privilege of a person to so amuse (or abuse) himself or herself entirely within the privacy of his or her home. Surely, if the right of privacy, expressed in such unequivocal terms in Stanley vs. Georgia exists in the penumbra of the First and Fourth Amendments, such a result would not follow.

It may be argued, however, that child pornography represents a substantially different class of materials than adult pornography or, indeed, any other form of materials not otherwise protected by the First Amendment. The Court, in Ferber, supra, provided its rationale for depriving child pornography of First

Amendment protection, in part, upon the fact that photographs and films of children engaged in sexual activities ". . . is intrinsically related to the sexual abuse of children . . ." in that the materials produced comprise a permanent record of the child's participation. In footnote 10, the Court emphasized and explained this rationale as follows:

> "[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography." Shouvlin, Preventing the Sexual Exploitation of Children: A Model Act, 17 Wake Forest L. Rev. 535, 545 (1981). Ferber, supra, at p. 759.

Petitioner concedes that substantial harm can or may be done to a child by the act of photographing him or her engaged in acts of sexual conduct. It is further conceded that the distribution of such photographs into the market, such as it is, may result in lasting harm to the child, arguably more devastating even than child abuse or prostitution. But it cannot be said that a child suffers <u>additional</u> harm by reason of the possession, by petitioner, of two or more copies of the same photograph if petitioner does not actually, nor intend to, distribute any of the copies to another. In like manner, the child does not suffer any further or additional harm when a person, such as petitioner, makes a copy of an existing photograph provided that the photograph is never displayed or

distributed to any other person.7

It may be argued that the infringement upon an individual's privacy interest is necessary to, or a permissible step in, the overall statutory scheme in the limitation or eradication of the sexual abuse of children. The Court, in Stanley, addressed at least the posses-

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7. It may be noted that the statute, Penal Code section 311.3(a), could be saved by including, as an element, the intent to distribute or exchange any copy made to other persons. The fact that anyone makes a copy of an existing photograph might, of and in itself, constitute evidence that he or she eventually intends to distribute, sell or trade the copy to another person. Certainly, in any given case, the totality of the evidence may be sufficient to allow the trier of fact to find, beyond a reasonable doubt, that a defendant intended to distribute copies of photographs which he made. Intent, or "scienter," is, after all, an essential element of all crimes and the indirectness with which the element is frequently shown in criminal prosecutions hardly suggests that the government be relieved of proving the element as a part of the crime, see Stanley vs. Georgia, supra, pp. 567, 568.

sion aspect of the issue as follows:

> "Finally, we are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory scheme prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution . . . we do not think that [such laws] would justify the infringement of the individual's right to read or observe what he pleases. Because the right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws. See Smith vs. California, 361 U.S. 147, 80 S. Ct. 215. . ." Stanley vs. Georgia, supra, at pp. 567, 568.

The same argument is applicable to the act of making a photographic copy or reproduction of a visual image heretofore in existence. The precise issue was

considered by the California Supreme Court in 1966, In Re Klor (1966) 64 Cal. 2d. 816, 51 Cal. Rptr. 903. In that case, the defendant was found guilty of violation of California Penal Code section 311.2[8] after the jury was instructed that he could be found guilty if the materials were found to be obscene and that defendant either prepared the materials or possessed them with the intent to distribute them. The court held:

> "Without the requirement that the defendant be shown to have prepared the material with intent to distribute it . . . the statute would apply to

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8. California Penal Code section 311.2, in pertinent part, provided as follows: "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into their state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, . . . or has in his possession with intent to distribute or to exhibit . . . any obscene matter is guilty of a misdemeanor."

> matter produced solely for the personal enjoyment of the creator . . . Such a statute would approach an interdiction of individual expression in violation of the First and Fourteenth Amendments." 51 Cal. Rptr. at 906.

The harm to children results from the act of sexually molesting children, photographing them engaged in sexual conduct, otherwise exploiting their innocence and introducing the product, child pornography, into the market so that the child must live with the knowledge of its existence for a lifetime. As bad as the child pornographic market is; as devastating as it is or may be for children who have suffered exploitation when it occurred and as they grew up into adulthood; as deviant as the individual may be who obtains enjoyment or has an interest in observing such products, it is nevertheless true that a child - or an

adult who was victimized as a child - does not suffer additional harm by or as a consequence of two or more copies of identically the same photograph in the hands of a single person. Accordingly, mere reproduction of an existing photograph, without an intent to distribute it or to show it to any other person, is a proteced right under the right of privacy.

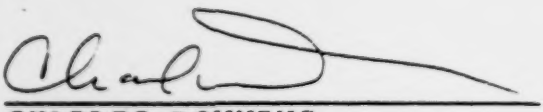
CONCLUSION

The mere possession of child pornographic materials is not prohibited by statute in the State of California. If mere possession is not unlawful, the duplication of an existing photograph, without any intent to distribute it to another, cannot be proscribed if the individual cannot constitutionally be prohibited from possessing the original. The mere possession of materials outside

the scope of the First Amendment is entitled to protection under the right of privacy.

That is, in substance, what petitioner here prays - that he be allowed to do, in the privacy of his own home, whatever it is that he wants to do so long as his conduct is not dangerous, does not harm another, or, in any case, does not increase the risk of harm to any other person.

Respectfully submitted,



CHARLES DOWNING
Attorney for Petitioner
JOHN ROBERT DUNCAN

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DIVISION

DIVISION THREE

In re JOHN ROBERT DUNCAN, On Habeas Corpus.	2d Civ. B022283 (Super.Ct. No. APHC 000554)
JOHN ROBERT DUNCAN, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, Respondent, THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	

Petition for Writ of Habeas Corpus from the Superior Court of Los Angeles

(Court of Appeal, Second Dist., Filed March 3, 1987, Clay Robbins, Jr., Clerk.)

County. John R. Hopson, Judge. Denied.

Charles Downing, attorney for Petitioner.

Ira Reiner, District Attorney of Los Angeles County, Donald J. Kaplan, Arnold T. Guminski, deputy district attorneys for Real Party in Interest.

INTRODUCTION

In this petition for a writ of habeas corpus we are asked to decide whether Penal Code section 311.3, subdivision (a), which provides "[a] person is guilty of sexual exploitation of a child when he or she knowingly develop[s], duplicate[s], print[s], or exchange[s] any film, photograph, video tape, negative, or slide in which a person under the age of 14 years engaged in an act of sexual conduct," is violative of the rights of free expression

and privacy guaranteed by the Constitution of the United States and the Constitution of the State of California.[1/] We answer that it is not.

1/ The full text of Penal Code Section 311.3 is as follows:

"(a) A person is guilty of sexual exploitation of a child when he or she knowingly develop (sic), duplicate (sic), print (sic), or exchange (sic) any film, photograph, video tape, negative, or slide in which a person under the age of 14 years engaged in an act of sexual conduct.

"(b) As used in this section 'sexual conduct' means any of the following:

"(1) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals.

"(2) Penetration of the vagina or rectum by any object.

"(3) Masturbation, for the purpose of sexual stimulation of the viewer.

"(4) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer.

(Continued to next page)

Footnote 1/ continued

"(5) Exhibition of the genitals, pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer.

"(6) Defecation or urination for the purpose of sexual stimulation of the viewer.

"(c) Subdivision (a) shall not apply to the activities of law enforcement and prosecution agencies in the investigation and prosecution of criminal offenses or to legitimate medical, scientific, or education activities, or to lawful conduct between spouses.

"(d) Every person who violates subdivision (a) is punishable by a fine of not more than two thousand dollars ($2,000) or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. If such person has been previously convicted of a violation of subdivision (a) or any section of this chapter, he or she is punishable by imprisonment in the state prison.

"(e) The provisions of ths (sic) section shall not appy to an employee of a commercial film developer who is acting within the scope of his employment and in accordance with the instructions of his employer, provided that the employee has no financial

(Continued to next page)

STATEMENT OF THE CASE

On July 20, 1983, John Robert Duncan (petitioner) was charged with two counts of violation of Penal Code section 311.3, subdivision (a). In count I, it was alleged that ". . . on or about February 1983, [a misdemeanor] was committed by [petitioner] . . . who did willfully, unlawfully, and knowingly photograph, develop, duplicate, print, or exchange any film, photograph, videotape, negative, or slide in which a person under the age of 14 years is engaged in an act of sexual conduct." Count II of the complaint alleged the identical substantive violation which was declared to have

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Footnote 1/ continued

interest in the commercial developer by which he is employed."

All further statutory references are to Penal Code unless otherwise indicated.

occurred ". . . on or about April, 1983 . . . ."

Petitioner entered a plea of not guilty. Thereafter, petitioner's section 1538.5 motion to suppress evidence which had been seized from his house at the time of his arrest was denied.

The evidence received during the court trial consisted of seven polaroid photographs found in a photo album in an attache case in the attic and a polaroid "Super Shooter" camera with an attachment for making copies, which had been seized during a police search of petitioner's residence pursuant to a search warrant. The manufacturer's coding on the back of three of the photographs indicated that the film had been manufactured in February, 1983. The manufacturer's coding on the back of the other four photographs indicated that the film had

been manufactured in April, 1983. Inside the camera was film with the same code marking that appeared on the four photographs on film manufactured in April, 1983.

Police officer William Dowerin of the Sexually Exploited Child Unit of Juvenile Division, City of Los Angeles, testified that he had corresponded with petitioner under various assumed names since 1978, when petitioner was confined to a state hospital as a mentally disordered sex offender. He testified that the ages of the children appearing in the photographs were approximately four to fourteen years of age and described the photographs, as follows:

> "2a and 2c one is a child which is completely nude with the legs spread apart and the second child is wearing a dress with no panties

where it shows her vagina area. People's 2b depicts a male adult penis touching the vagina with what appears to be a female juvenile under the age of fourteen."

"2d depicts a male adult penis close to or touching the mouth of what appears to be a female juvenile under the age of fourteen and there appears to be white liquid around the child's mouth."

"2e depicts a female child under the age of ten wearing [what] looks like a skirt and blouse with no underwear, her legs are spread apart and hands are on her vagina. I am aware of who this child is based upon prior investigation."

"2f is a picture of a female approximately four to five years of age wearing a dress but no underwear

and the vagina is shown, again, this is the same child as in 2C but at a younger age."

"2g, two female juveniles approximately eight years of age, one female juvenile was holding some type of object in the vagina of the second child and touching her vagina with her hands."

Officer Dowerin further testified that pictures 2b, 2c, and 2f were in existence in 1977, and were implicated in the investigation of petitioner which had occurred during that year. He was unable to date the remaining four polaroid pictures received in evidence, beyond testifying as to the date of manufacture of the polaroid film on which they appeared. He was unable to testify as to who reproduced the seven pictures and could not say any more than that they had

been reproduced in 1983.

Petitioner testified that he first saw the photographs introduced at trial six years earlier but denied that he had reproduced any of them in the last year.

Petitioner was found guilty on both counts of the complaint and sentenced to two consecutive 1-year terms in county jail. The judgment was affirmed on appeal and petitioner's petition to the superior court for a writ of habeas corpus was denied.

On August 8, 1986, he filed a petition for writ of habeas corpus in this court.

CONTENTIONS

Petitioner asserts four major contentions:

1. That section 311.3, subdivision (a), is unconstitutional on its face and as applied to him under the First and

Fourteenth Amendments of the Constitution of the United States and article I, sections 2 and 15 of the Constitution of the State of California; and that petitioner, having been tried and convicted of a violation of section 311.3, subdivision (a), was deprived of First, Fourth and Fourteenth Amendment guarantees;

2. That section 311.3, subdivision (a), unconstitutionally interferes with petitioner's right of privacy as guaranteed by the Constitution of the United States and article I, section 1 of the Constitution of California;[2/]

2/ The right of privacy exists under the federal Constitution, and finds its roots in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, and in the concept of liberty guaranteed by the Fourteenth Amendment. (Roe v. Wade (1973) 410 U.S. 113, 152.) The right of privacy is expressly protected under article I, section 1 of the California Constitution. (See People v. Privitera (1979) 23 Cal.3d 697, 709-710.)

3. That petitioner was deprived of procedural and substantive due process in that he did not receive effective assistance of trial and appellate counsel as is his due under the Sixth and Fourteenth Amendments; and

4. That the sentence imposed by the trial court constitutes multiple punishment of the same offense contrary to the dictates of the Fifth and Fourteenth amendments and/or cruel and unusual punishment under the Eighth and Fourteenth Amendments.

We find there is no merit to petitioner's contentions and therefore deny his petition.

DISCUSSION

I. The Constitutionality of Section 311.3, subdivision (a).

Initially, we address petitioner's challenges to the constitutionality of section 311.3, subdivision (a) (conten-

tions 1 and 2). The thrust of his argument is that the prohibition in the penal statute is overbroad in that it criminalizes the mere possession of child pornography in the privacy of one's home in violation of the constitutional rights of free expression and privacy, citing Stanley v. Georgia (1969) 394 U.S. 557, and Bloom v. Municipal Court (1976) 16 Cal.3d 71, 81.

Petitioner argues that "a person is entitled to engage in any solitaire [sic] conduct he chooses entirely within the perimeter of his own home." He "does not challenge the right or power of the State to adopt legislation aimed at the eradication of distribution of child pornograhic materials" and concedes, for purposes of argument, "the lasting harmful effect that such materials may have. . . ." Petitioner identifies the

central issue as "whether or not a statute with an otherwise legitimate purpose, i.e., limitation of child pornography, can subject an individual to criminal sanctions for the mere private possession of such materials . . . ." Petitioner recognizes that the state may permissively regulate conduct in the privacy of the home if there are "extenuating circumstances" which may endanger other members of society. He contends, however, that there is no credible evidence that exposure to child pornography increases the occasions of child molestation, abuse or any other form of anti-social activity.

In Stanley v. Georgia, supra, 394 U.S. 557, the United States Supreme Court recognized the First Amendment right to possess obscene materials in the privacy of one's own home. "If the First Amend-

ment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." (Id., at p. 565.) The court rejected Georgia's assertion of the right to protect the individual's mind from the effects of obscenity (ibid.) and rejected, on the present state of knowledge, any connection between possession of obscene materials and antisocial conduct. (Id., at p. 567.)

In Bloom v. Municipal Court, supra, 16 Cal. 3d 71, the California Supreme Court upheld the constitutionality of section 311.2, subdivision (a), which makes it a misdemeanor to cause obscene materials to be brought within the state,

or to possess, prepare, publish or print such material with intent to distribute such material. In doing so, the court rejected petitioner's contention that the right to possess obscene materials in the privacy of one's own home, announced in Stanley, implies the right not only to receive, but sell and distribute. (Id., at p. 81.)[3/]

Contrary to petitioner's assertion, in the case before us, we are not dealing with the "mere possession of obscene materials" protected by the First Amendment, but with the reproduction of child pornography, the control of which is subject to different constitutional

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3/ The United States Supreme Court similarly has acknowledged that the right to receive information and ideas does not necessarily create a right to distribute obscene materials. (See, e.g., United States v. Reidel (1971) 402 U.S. 351 at p. 356; Paris Adult Theatre I v. Slayton (1973) 413 U.S. 49.)

limitations.

In New York v. Ferber (1982) 458 U.S. 747, the United States Supreme Court upheld a New York statute which prohibits persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicts such a performance whether the material is obscene or not. (See First Amendment -- Freedom of Speech -- Child Pornography, Obscene or Not, Possesses No First Amendment Protection (1983) 23 Santa Clara Law Review 675.)[4/]

4/ The statute in Ferber prohibits the knowing use or promotion of a child less than 16 years of age in a sexual performance. A performance is defined as "'any play, motion picture, photograph or dance.'" (Ferber, supra, at p. 751, emphasis added.) "'"Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.'" (Ibid.)

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The Supreme Court recognized, "In recent years, the exploitive use of children in the production of pornography has become a serious national problem." (New York v. Ferber, supra, 458 U.S. 747, 749, fn. omitted.)[5/] Acknowledging that

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Footnote 4/ continued

See State v. Meadows (October 7, 1986, No. 86-233) ___ Ohio St.3d -- (upheld constitutionality of statute criminalizing the private possession of sexually oriented material depicting a minor participating or engaging in sexual activity, masturbation, or bestiality.)

5/ The court continued:

"The Federal Government and 47 States have sought to combat the problem with statutes specifically directed at the production of child pornography. At least half of such statutes do not require that the materials produced be legally obscene. Thirty-five States and the United States Congress have also passed legislation prohibiting the distribution of such materials; 20 States prohibit the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene." (Id., at p. 749, fn. omitted.)

laws directed at the dissemination of child pornography, like obscenity statutes, run the risk of suppressing protected expression by "allowing the hand of the censor to become unduly heavy," the Supreme Court nevertheless concluded that the States are entitled to greater leeway in the regulation of child pornography. "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' [Globe Newspaper Co. v. Superior Court (1982) 457 U.S. 596, 607, 73 L.Ed.2d 248, 102 S.Ct. 2613.] 'A democratic society rests, for its continuance, upon the healty, well-rounded growth of young people into full maturity as citizens.' [Prince v. Massachussetts (1944) 321 U.S. 158, 168, 88 L.Ed. 645, 64 S.Ct. 438.] Accordingly, we have

sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In [Prince v. Massachussetts, supra], the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statutes effect on a First Amendment activity. In [Ginsberg v. New York (1968) 390 U.S. 629, 20 L.Ed.2d 195, 88 S.Ct. 1274, 44 Ohio Op.2d 339] we sustained a New York law protecting children from exposure to nonobscene literature. Most recently, we held that the Government's interest in the 'well-being of its youth' justified special treatment of indecent broadcasting received by adults as well as children. [FCC v. Pacifica Foundation (1978) 438 U.S. 726, 57 L.Ed.2d 1073, 98

S.Ct. 3026.]" (Id., at pp. 756-757.)

Petitioner asserts that section 311.3, in contrast to the law upheld in Ferber, does not require proof of an intention to distribute, and argues that as such it is overbroad in that it effectively prohibits the mere possession of child pornography.

Petitioner's argument lacks merit. Although the statute upheld in Ferber was primarily directed at the distribution of child pornography, it does not follow that regulation of child pornography is constitutionally limited to prohibition of its distribution. Furthermore, section 311.3 does ot prohibit "mere possession" but rather outlaws knowing development, duplication, printing or exchange of film, photographs, video tapes, negatives or slides of children engaged in sexual acts, as defined,

conduct which the Legislature has determined has a detrimental effect on children and society.

The purpose of section 311.3 is to protect children from sexual abuse and invasion of their privacy rights through the development and duplication of photographs, movies and video tapes depicting them engaged in sexual conduct. Legally incapable of consent, these children are perpetually exploited, first by the original performance of these acts; then by the creation of a permanent record of the conduct; again each time that record is reproduced; and then again when that photograph, film or video tape is viewed or passed on to another.[6/] In

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6/ As noted in Ferber, supra, 458 U.S. 747, 759, fn. 10, quoting one authority, "'[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution.

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addition, these materials are used to induce other children to engage in sexual activity.

The legislative history of section 311.3 reveals that this provisions was designed "to deter pedophiles from exchanging pictures of minors and to prevent child molesters from using pictures of minors engaged in sexual conduct to suggest to their victims that such acts are acceptable." (Report of the Senate Committee on Judiciary on Sen. Bill 331 (1981-82 Reg. Sessions) p. 2.)7/

Footnote 6/ continued

Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place.' [Citation.]"

7/ "According to the bill's source [Joint Committee for Revision of the Penal Code], existing law contains no mechanism to prevent the noncommercial exchange of pictures showing minors

(Continued to next page)

As the Supreme Court declared in Ferber, "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." (Ferber, supra, at p. 757.)

"[V]irtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating 'child pornography.' The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That

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Footnote 7/ continued

engaged in acts that are currently illegal to photograph. The source states that child molesters use such pictures to convice [sic] children that sexual activity is acceptable. They show these pictures to their intended victims to demonstrate that other children engage in these acts." (Ibid.)

judgment, we think, easily passes muster under the First Amendment." (Id., at p. 758; fn. omitted.)

The Supreme Court set forth guidelines concerning legislation which is designed to control child pornography: The conduct to be prohibited must be adequately defined; the offense should be limited to works that visually depict sexual conduct by children below a specified age; and the category of "sexual conduct" proscribed must also be suitably limited and described. The test of child pornography, compares to the obscenity standard as follows: "A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered

as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection. As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." (Id., at pp. 764-765.)

In light of these guidelines, we consider the constitutionality of section 311.3. In doing so, we are mindful that a statute should not be declared facially invalid on the basis of the First Amendment overbreadth doctrine unless it is substantially overbroad, particularly where conduct and not merely speech is involved. (Ferber, supra, at p. 770; Broadrick v. Oklahoma (1973) 413 U.S.

601, 613, 615.)

Section 311.3, subdivision (a), proscribing the development and reproduction of pictures of a child engaged in sexual conduct, is part of a statutory scheme to combat the exploitive use of children in the production of pornography. Section 311.2, subdivision (b), prohibits the distribution or possession, preparation, publication or printing, with the intent to distribute or exhibit for commercial purposes, obscene matter depicting a person under the age of 18 years engaged in sexual activity. Section 311.2, subdivisions (c) and (d) prohibit distribution of or possession with intent to distribute materials depicting a person under the age of 17 years engaged in explicit sexual conduct, even without commercial purpose and even

though the material is not obscene.8/

Under section 311.4, the person who directly employs or otherwise uses a person under 17 years of age in preparing sexually explicit visual materials is guilty of a felony. (See Crimes; sexual exploitation of children (1982) 13 Pacific Law Journal 640.)

Section 311.3 makes it a crime to "knowingly develop, duplicate, print or exchange any film, photograph, video tape, negative, or slide," thus adequately defining the prohibited conduct and including a scienter element. It appropriately limits its application to works that depict sexual conduct by

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8/ Section 311.2, subdivisions (c) and (d) were enacted in their current form in 1984. (Stats. 1984, ch. 1489, § 1, pp. 2-3.) In 1981, when section 311.3 was enacted, the noncommercial production and distribution of child pornography was not outlawed. (See note 7, supra.)

children below a specified age, 14 years, and the category of "sexual conduct" proscribed is specifically defined and limited.[9/] As such, it is difficult to envision its potential application into areas of protected expression. Under the guidelines set forth by the Supreme Court in Ferber and in light of the compelling interest of the state in the protection of children from sexual exploitation through the production and reproduction of child pornography, we hold that section 311.3 does not interfere with constitutional rights of free expression and privacy. It is neither overbroad nor invalid as applied to petitioner.

II. Competency of counsel.

Petitioner contends that he was

9/ "Sexual conduct" is defined in subdivision (b) of section 311.3, set forth in footnote 1, supra.

deprived of effective representation of counsel at the trial level and, by appellate counsel's failure to raise that issue on appeal, was similarly deprived of effective representation on appeal. He also contends that his present counsel's representation on the petition for writ of habeas corpus in the superior court was deficient.

The right to competent representation at trial is grounded in the constitutional right to the assistance of counsel. (U.S. Const., Sixth Amend.; Cal. Const., art. I, § 15; McMann v. Richardson (1970) 397 U.S. 759, 771, fn. 14 [25 L.Ed. 2d 763, 773, 90 S.Ct. 1441]; People v. Pope (1979) 23 Cal.3d 412, 422.) Inadequate representation is determined if trial counsel "failed to act in a manner to be expected of reasonably competent attorneys acting as

diligent advocates'" and "'counsel's acts and omissions resulted in the withdrawal of a potentially meritorious defense.'" (People v. Fosselman (1983) 33 Cal.3d 572, 581.) Where the record does not reveal the basis for the challenged acts or omissions, a claim of ineffective assistance is appropriately made by habeas corpus proceedings, where there is an opportunity in an evidentiary hearing to have trial counsel describe his or her reasons for acting or failing to act in the manner complained of. (See Pen. Code, §§ 1483 and 1484; e.g., In re Williams (1969) 1 Cal.3d 168.) The court is then in a position to intelligently evaluate whether counsel's acts or omissions were within the range of reasonable competence. (People v. Pope, supra, at p. 426.) Since we have not been provided with testimony regarding

counsel's reasons for conducting the trial as he did, we are confined to the record. The alleged failures of petitioner's counsel will be addressed individually.

A. First, petitioner asserts that trial counsel was incompetent for failure to challenge the legal basis for the issuance of the search warrant which led to the police's discovery of the photographs and camera introduced as evidence against petitioner at trial. He argues that the warrant was facially defective and diligent counsel would have challenged its issuance.

A search warrant may properly be issued "upon probable cause, supported by affidavit," describing property consisting of "evidence which tends to show that sexual exploitation of a child, in violation of section 311.3, has occurred

or is occurring." (§§ 1524, subd. (a)(5), 1525.)

Petitioner asserts that the affidavit of the Officer Dowerin in support of the search warrant attempted to establish reasonable cause to believe petitioner had violated section 311.3, subdivision (a) "because (1) he is a pedophile; (2) that pedophiles do not destroy pornographic material; (3) that pedophiles retain such materials for personal gratification; (4) that pedophiles keep correspondence from other pedophiles; (5) that pedophiles gain a certain pride from exhibiting such materials; (6) that pedophiles conceal such materials from police; and (7) that materials may exist which would identify other pedophiles and/or victims. In short, the object of the search warrant was known to be a pedophile and, accord-

ingly, reasonable cause existed to search his home."

Petitioner's description of contents of the affidavit overlooks the rendition of other significant facts, sufficient to establish probable cause to believe that the items referred to in the search warrant "may be found" at petitioner's residence and tending to show that sexual exploitation of a child, as defined in section 311.3, subdivision (a) "has occurred or is occurring" there. Of particular significance was an attached copy of a letter postmarked March 7, 1983, sent by petitioner to "Jack Roose," one of the undercover identities used by Officer Dowerin in communicating by mail with petitioner. Enclosed in the letter was a photograph that the officer had previously mailed to petitioner and another photograph taken by petitioner.

Petitioner's letter states, in pertinent part, as follows:

> "Enclosed is your pix (which I really like) and one of mine which was taken a few years back. The girl in my pix was 10 at the time. What ages of girls do you prefer? [The affidavit of Officer Dowerin identified the child appearing in the picture sent by petitioner as a juvenile who had been involved in an investigation of petitioner which had occurred in 1977. The affidavit of Dowerin indicates that the picture sent by petitioner depicts the juvenile orally copulating petitioner].
>
> "I think I can trust you since cops don't send pixs of young girls, but I'll have to know more about you before I can send anything good. . . .

"You can make cheap copies of polaroids from a Super Shooter which has an attachment for making copies. It's better than trying to send them in somewhere that you're not sure about. It's a good idea to have your own photolab, but its so expensive. . . ."

In light of the evidence supporting the issuance of the search warrant, petitioner's contention that counsel's failure to attack the issuance of the search warrant constituted ineffective representation is meritless.

B. Petitioner also contends that trial counsel's development and presentation of the entrapment defense was deficient in that he may have neglected to conduct discovery regarding the correspondence between petitioner and Officer Dowerin and failed to offer this

correspondence as evidence at trial. Petitioner also notes that in its memorandum of decision denying a writ of habeas corpus, the superior court observed that petitioner's counsel did not produce trial counsel at the hearing on his petition in order that he might give testimony concerning his professional determinations relative to this correspondence, and therefore present counsel may also have provided inadequate representation.

We find no merit to petitioner's contention. There is nothing in the record to compel us to conclude that trial counsel did not have access to the correspondence between petitioner and officer Dowerin or that there was not an entirely reasonable basis for trial counsel's conduct in regard to this correspondence. Despite the superior

court's opinion, petitioner again chose not to supplement the record or to present additional evidence on this issue to this court; consequently, we find it unnecessary to speculate that there is any substantial basis to this particular contention. (See People v. Fosselman, supra, 33 Cal.3d 572, at pp. 581-582.)

C. Petitioner suggests that counsel erred in presenting the inconsistent defenses that petitioner did not duplicate photographs in violation of section 311.3, subdivision (a), and that of entrapment. It is well settled that it is proper to do so. "Although the defense is available to a defendant who is otherwise guilty [citation], it does not follow that the defendant must admit guilt to establish the defense. A defendant, for example, may deny that he committed every element of the crime

charged, yet properly allege that such acts as he did commit were induced by law enforcement officers." (People v. Perez (1965) 62 Cal.2d 769, 775.) Furthermore, we find no merit in petitioner's argument that it is "unthinkable" to anticipate that such an approach might succeed before an experienced judge. Indeed, the court is more likely than a jury to understand and appreciate the assertion of inconsistent defenses.

D. Petitioner claims inadequacy on the part of trial and appellate counsel for their failure to challenge the proof of the time of the commission of the offenses in counts I and II of the complaint in that the only proof submitted concerned the date of manufacture of the film, not the date the photographs were taken. He argues that the manufacturer's code on the film had no relation-

ship to the actual date the photographs were made.

Petitioner's argument ignores the obvious conclusion that the film was used to duplicate existing photographs sometime between the manufacture of the film (February and April, 1983) and the date the photographs were seized and petitioner was arrested in July, 1983. The difference in the dates of manufacture supports the conclusion that the duplicates were made on at least two different occasions. It is not necessary to prove the dates of the offenses with exactness, as long as the time is not a material ingredient of the offense. (§ 955; People v. Mack (1959) 169 Cal.App.2d 825, 829.)

III. Petitioner's final major contention is that his sentence of two consecutive one-year terms for his

conviction of two counts of violation of section 311.3, subdivision (a), which is the maximum provided for under the terms of subdivision (d) of that section, constitutes multiple punishment for the same offense and cruel and unusual punishment under the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States and under article I, section 17 of the Constitution of California.

The gravaman of petitioner's contention is that the penalty for violation of section 311.3, subdivision (a), is heavier than the punishment for distribution of child pornography.

"[A] punishment may violate article 1, section 6, of the Constitution if, although not cruel or unusual in its motive, it is so disproportionate to the crime for which it is inflicted that it

shocks the conscience and offends fundamental notions of human dignity." (In re Lynch (1972) 8 Cal.3d 410, 424.) Comparing the challenged penalty with punishments prescribed by the Legislature for other crimes, is one technique for testing its validity. (Id., at p. 426.)

Petitioner's contention lacks merit. At the time of his sentencing in 1983, commercial distribution of obscene materials depicting a child under 18 engaged in explicit sex acts was a felony, punishable in state prison for two, three or four years, or by a fine of up to $50,000 or by both fine and imprisonment. (§ 311.2, subd. (b).)[10/] Pursuant to subdivision (c), adopted in

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10/ Section 311.2, subdivision (b) was amended in 1985 to provide for a term of two, three or six years in state prison and a maximum fine of $100,000. (Stats. 1985, ch. 1099, § 5, p. 6.)

1984, the prescribed punishment for noncommercial distribution of child pornography, whether obscene or not, to a person 18 years of age or older is the same as that for violation of section 311.3, subdivision (a): Imprisonment in county jail for up to one year or a fine not exceeding $2,000, or both, for a first offense. A second offense is a felony. (§§ 311.2, subd. (c), 311.3, subd. (d).) Pursuant to subdivision (d) of section 311.2, also added in 1984, the noncommercial distribution of child pornography to a person under 18 years of age is a felony. (§ 311.2, subd. (d).)[11/]

11/ Petitioner argues that the punishment provisions of section 311.9, subdivision (a), apply to violations of section 311.2, subdivisions (c) and (d).

Section 311.9, subdivision (a) states:

(Continued to next page)

Footnote 11/ continued

"Every person who violates Section 311.2 or 311.5, except subdivision (b) of Section 311.2, is punishable by a fine of not more than one thousand dollars ($1,000) plus five dollars ($5) for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed ten thousand dollars ($10,000), or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of any offense in this chapter, or of a violation of Section 313.1, a violation of Section 311.2 or 311.5, except subdivision (b) of Section 311.2, is punishable as a felony."

Petitioner in effect argues that pursuant to subdivision (d) of section 311.3, a person could be sentenced to a term of up to one year for each unit of material, i.e., each photograph duplicated in violation of section 311.3, subdivision (a), and could receive up to one year for each, in contrast to the lighter sentences set forth in section 311.9, subdivision (a).

(Continued to next page)

"Judicial intervention in the determination of criminal penalties . . . is not to be asserted except in the most extraordinary of cases. As stated in [In re Lynch (1972) 8 Cal.3d 410, 423-424]: 'Whether a particular punishment is disproportionate to the offense is, of course, a question of degree. The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical

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Footnote 11/ continued

The comparison is faulty because section 311.9, subdivision (a) does not apply to section 311.2, subdivisions (c) and (d), which define both crime and punishment and were enacted in 1984. Section 311.9, subdivision (a) was last amended in 1977. Under generally accepted principles of statutory construction, in the case of apparent conflict between code sections passed at different times, the latter provision, as the last expression of the legislature's will, prevails. (County of Ventura v. Barry (1927) 202 Cal. 550, 556.)

alternatives, consideration of relevant policy factors, the responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible. The judiciary, accordingly, should not interfere in this process unless a statute prescribes a penalty "out of all proportion to the offense" [citations], i.e., so severe in relation to the crime as to violate the prohibition against cruel or unusual punishment.'" (People v. Truett (1981) 126 Cal.App.3d 156, 164.)

There is no basis for concluding that the punishment for sexually exploiting a child by the duplication of photographs of the child engaged in sexual conduct is disproportionate to other penalties prescribed in the area of child pornography, including those for distribution.

Petitioner's related contention that his sentence of two consecutive one-year terms constitutes multiple punishment for the same offense overlooks the clearly established findings, supported by substantial evidence in the record, that he duplicated photographs in violation of the statute on at least two separate occasions.

We hold that petitioner's sentence pursuant to subdivision (d) of section 311.3 is constitutionally valid.

CONCLUSION

Judicial concern in the area of sexual exploitation has had a long history.

"I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose

hands a publication of this sort may fall. Now, with regard to this work it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."[12/]

We similarly are quite certain that the state's compelling interest in protecting its children from sexual exploitation far outweighs the slight intrusion upon the non-absolute rights of free expression and privacy of the person who desires to possess and duplicate photographs, video tapes or films depicting children engaged in lewd sexual conduct.

12/ Lord Cockburn, C.J., Regina v. Hicklin (1868) 3 Q.B. 360, 371.)

DISPOSITION

The petition for writ of habeas corpus is denied.

CERTIFIED FOR PUBLICATION

ARABIAN, J.

We concur:

KLEIN, P.J.

DANIELSON, J.

APPELLATE DEPARTMENT OF THE

SUPERIOR COURT

STATE OF CALIFORNIA,

COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,	Superior Ct. No. CR A21325
Plaintiff and Respondent,	Municipal Court of the Southeast/South Judicial Dist.
vs.	No. M98758
JOHN ROBERT DUNCAN,	OPINION AND JUDGMENT
Defendant and Appellant.	

Appeal by defendant from Judgment of the Municipal Court, John R. Hopson, Judge.

JUDGMENT AFFIRMED.

For Appellant - Michael Morse

For Respondent - Ira Reiner, District Attorney
Donald J. Kaplan, Deputy District Attorney
Arnold T. Guminski, Deputy District Attorney

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(Filed October 1, 1985, Frank S. Zolin, County Clerk, by A. B. Hardey, Deputy)

Defendant John Robert Duncan appeals from a judgment of conviction following a court trial at which time he was found guilty as charged in counts I and II of a misdemeanor complaint of violating Penal Code Section 311.3, subdivision (a)[1] (knowingly developing, duplicating, etc. photographs, etc. of a person under the age of 14 years engaged in an act of sexual conduct.) The thrust of his position is that there is insufficient evidence to support the judgment. We disagree. The summary of the facts,

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1. Subdivision (a) of Section 311.3 reads.

> A person is guilty of sexual exploitation of a child when he or she knowingly develop (sic), duplicate (sic), print (sic), or exchange (sic) any film, photograph, video tape, negative, or slide in which a person under the age of 14 years engaged in an act of sexual conduct.

post, is consonant with our duty to view the evidence in a light favorable to the judgment. (People v. Redmond (1969) 71 Cal.2d 745, 755.)

William H. Dowerin, a police officer of the City of Los Angeles attached to the sexual exploited child unit, proceeded on July 19, 1983 to 3734 Dewayne Way to execute search warrant number 20778. The appellant met him at the door, and was served with the warrant. Appellant's house was then searched.

Three polaroid photographs, People's exhibits 2a, 2b, and 2c, were found by Dowerin in a photo album in an attache case in the attic. The officer stated that the children depicted in these photographs were approximately eight to ten years of age. People's exhibit 2a depicts a girl with an uplifted dress, her legs spread out and her vagina

exposed. People's exhibit 2b depicts a penis touching the vagina of a girl. People's exhibit 2c depicts a nude girl with spread legs, her vagina exposed. Based upon the manufacturer's code on the back of the photographs, the officer's opinion was that each photograph was manufactured in February 1983. The officer also found polaroid photographs received as People's exhibits 2d, 2e, 2f and 2g in the same album as the other three pictures. People's exhibit 2d shows a girl with a penis at her mouth. People's exhibit 2e depicts a girl on a bed, her legs spread out and her vagina exposed. People's exhibit 2f shows a sitting girl with her vagina exposed. People's exhibit 2g shows two nude girls, one of whom is touching her vagina and holding some object at or in the vagina of the other girl. The girls depicted in

the photographs are clearly below the age of 14 years. People's exhibits 2d, 2e, 2f, and 2g were manufactured in April 1983, according to the officer's opinion based upon the coding on the back of each photograph.

When Dowerin returned from the attic, he noticed appellant in a fetal position, lying on the couch. Appellant complained that the officer as (sic) taking his old photographs "which had nothing to do with anything he was doing now." Appellant was arrested for violating Penal Code section 311.3, subdivision (a).

The officer acknowledged that he could not tell from any of these pictures that they were reproduced by appellant. He testified, however, that a camera was seized from appellant's residence which contained film in it with the same

manufacturer's code markings (i.e., D307781Z) as those appearing on the seized photographs received as People's exhibits 2a through 2g.

Appellant testified that he had not taken or reproduced any of the photographs in question. However, he testified that he had a camera with a device used to reproduce photographs. He described the camera as a "super shooter," and that he had told Dowerin that it was real cheap to make copies of polaroids if one had a super shooter with attachments for making copies. However, he stated that he had not used the device in years. Indeed, he stated he had not used this camera since 1977 except that he might have used it just to see if it works. He stated that it was not working; its batteries were all dead. He stated he never used it to take child

pornography pictures in 1983. He did not remember whether there was some film in this camera when it was taken away by the officer.

The evidence bearing upon the issue of entrapment raised by appellant, also viewed in a light most favorable to the judgment, is as follows:

Officer Dowerin testified that he became aware of appellant following an arrest of one Cross, and that appellant had been arrested by Long Beach police for child molestation. Appellant was found guilty and was committed to Patton State Hospital as a mentally disordered sex offender.

According to appellant, he was committed to the hospital from May 1978 to October 1979. He had been arrested in October 1977. Appellant acknowledged that he had taken pictures of "maybe 50

or 60" children in sexual positions, for which he did his time. After the term at Patton, appellant was sent to State Prison. In connection with another investigation of nine persons who had molested children, appellant was given immunity to testify before the Los Angeles Grand Jury. These persons were indicted and convicted of child molestation conspiracy based upon that investigation.

While appellant was at Patton State Hospital, Dowerin initiated correspondence with appellant under the assumed name of Bill Ward. Dowerin indicated that he had a sexual interest in children. Appellant responded that he had continuing sexual interest in children and that if he was to be sent any photographs they should be sent to his house. Dowerin sent appellant "possibly around

ten" letters. The officer explained that he "was soliciting information as to other people, other adults involved in the sexual exploitation of children and his thinking when he was released what his attitude would be towards children." The correspondence ended after eight months. It was then resumed about two years later when Dowerin received an unsolicited letter from appellant which indicated that appellant had been in the State Prison, that he was now released, and that he wanted to contact Dowerin to seek out friendship because he was a pal. Dowerin began contacting appellant using the name Pete Davis.

Sometime while appellant was on parole, he was found to be in violation by his parole officer after the latter found child pornography in his house. When appellant was released from custody,

Dowerin resumed correspondence with him under the name of Jack Roose.

The trial judge ruled against appellant upon the issue of entrapment.

From our view of the record we find no merit to appellant's complaint that "[n]o concrete evidence was offered by the People such that one could conclude beyond a reasonable doubt that the defendant, himself, reproduced those photographs. Therefore, the People failed to meet their burden of proof of the elements of the offense charged." The record, to the contrary, reveals that the film in a camera seized at appellant's home contained the same code markings as those on People's exhibits 2a through 2g. From this evidence the trier of fact was entitled to infer that those exhibits were shot by appellant with the camera seized from his home. (See, e.g.,

People v. Mosher (1969) 1 Cal.3d 379, 395; People v. Roberts (1975) 51 Cal.App.3d 125, 138.)

Similarily (sic), we find ample evidence in the record to support the trial judge's rejection of appellant's entrapment defense. The keystone of the defense mandates an affirmative answer to the question: "was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense?" (People v. Barraza (1979) 23 Cal.3d 675, 689-690.) In the present case the answer is negative. Although Dowerin initially contacted appellant, there was a two year interval from that time until contact was reestablished. This letter contact was in fact initiated by appellant by sending an unsolicited letter to Dowerin in his guise as "Bill Ward" in which letter appellant expressed

his desire "to seek out friendship because he was a pal." (See, e.g., People v. Kelly (1984) 158 Cal.App.3d 1085, 1100-1101.)

The judgment is affirmed.

/s/ Cooperman
Presiding Judge

We concur.

/s/ Bernstein
Judge

/s/ Shabo
Judge

SUPERIOR COURT, STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

In re JOHN ROBERT DUNCAN,	NO. APHC 000554
Petitioner,	Municipal Court of the Southeast/South Judicial Dist.
On Habeas Corpus.	No. M98758
	MEMORANDUM OF DECISION

For Petitioner - Charles Downing

For Real Party In Interest - Ira Reiner, District Attorney
Arnold J. Guminski, Deputy District Attorney

On July 20, 1983 petitioner was charged with two counts of violation of Penal Code Section 311.3, subdivision (a). In count I, it was alleged that " . . . on or about February 1983, . . . a misdemeanor was committed by [petitioner] . . . who did willfully, unlaw-

(Filed June 25, 1986, Frank S. Zolin, County Clerk, by B. J. Schneider, Deputy)

fully, and knowingly photograph, develop, duplicate, print, or exchange any film photograph, videotape, negative, or slide in which a person under the age of 14 years is engaged in an act of sexual conduct." Count II of the complaint alleged the identical substantive violation which which was declared to have occurred " . . . on or about April, 1983 . . . ."

Petitioner entered a plea of not guilty. Thereafter, petitioner moved to suppress the evidence which had been seized from his house at the time of his arrest on July 19, 1983 under the provisions of Penal Code section 1538.5. The suppression motion was heard on October 12, 1983, and was denied.

On October 12, 1983, following a court trial, petitioner was found guilty on both counts of the complaint, and,

thereafter, appealed to the Appellate Department of the Los Angeles County Superior Court.

On October 1, 1985, the Appellate Department filed its opinion and judgment affirming the judgment of the municipal court. On November 1, 1985, petitioner filed an unverified petition for habeas corpus requesting relief from unlawful restraint by reason of a purportedly illegal order.

Thereafter, on February 5, 1986, this court stayed proceedings in the Municipal Court of the Southeast/South Judicial District in case No. M98758, until further order of this court, and appointed Charles Downing, Esquire, to represent petitioner in his application and petition for writ of habeas corpus.

On March 21, 1986, Attorney Downing filed a supplement to petition for writ

of habeas corpus, and supporting documents. This supplement was properly verified by petitioner on March 20, 1986.

On April 11, 1986, the People of the State of California, Real Party in Interest, by and through their counsel, the District Attorney for Los Angeles County, filed a return and answer to petition for writ of habeas corpus.

On April 17, 1986, pursuant to an order rendered by this court on March 31, 1986, the Municipal Court of the Southeast/South Judicial District and the People of the State of California, as represented by the District Attorney, appeared to show cause why the relief sought in the petition for habeas corpus should not be granted.

Following oral argument, and without either side offering evidence, the matter was taken under submission.

In his verified supplement to petition for writ of habeas corpus, petitioner makes three major contentions:

1. That petitioner was deprived of effective representation of counsel at trial, and on appeal to the Appellate Department of the Los Angeles County Superior Court, in derogation of his rights under the Sixth and Fourteenth Amendments of the United States Constitution, and of his rights under article I, section 15 of the Constitution of the State of California.

2. That Penal Code section 311.3, subdivision (a), under which petitioner was charged and convicted, contravenes the First and Fourteenth Amendments of the Constitution of the United States, and article I, section 2, section 13, and section 15, clause 3 of the Constitution of the State of California, in that it is

overbroad, both facially, and in its application to petitioner in the case at bench; and

3. That Penal Code Section 311.3, subdivision (a) is violative of the Fifth, Eighth and Fourteenth Amendments of the Constitution of the United States, and article I, section 17 of the California Constitution, in that it provides multiple punishment for the same offense, and constitutes cruel and unusual punishment.

I.

Initially, the court addresses petitioner's contentions regarding his claim that he was deprived of effective representation of trial and appellate counsel.

(a) He argues first that counsel were incompetent for failure to challenge the legal basis for the issuance of the

search warrant under which his home was searched, but only challenged the manner in which the warrant was executed.

This court has read the affidavit of Officer William H. Dowerin, dated July 18, 1983, and the search warrant issued by Judge Michael Sauer, of the Municipal Court of the Los Angeles Judicial District, on the same date. This court concurs with the determination by Judge Sauer that the affidavit of Officer Dowerin sets forth facts constituting reasonable cause to believe that the items referred to in the search warrant "may be found" at the residence of petitioner, located at 3734 Duane Way, South Gate, California, and that the factual allegations contained in the foregoing affidavit tended to show that sexual exploitation of a child, as defined in Penal Code section 311.3,

subdivision (a) "has occurred or is occurring" at the aforementioned address.

Of particular significance was a copy of a letter which was attached to the affidavit of Officer Dowerin, postmarked March 7, 1983, and sent by petitioner to "Jack Roose," an undercover identity which had been utilized by Officer Dowerin in communicating by mail with petitioner. The letter was received by Officer Dowerin on March 15, 1983. Enclosed in the letter was a photograph that Officer Dowerin had previously mailed to petitioner and another picture taken by petitioner. Petitioner's letter states, in pertinent part, as follows:

> "Enclosed is your pix (which I really like) and one of mine which was taken a few years back. The girl in my pix was 10 at the time. What ages

of girls do you prefer? [The affidavit of Officer Dowerin identified the child appearing in the picture sent by petitioner as a juvenile who had been involved in an investigation of petitioner which had occurred in 1977. The affidavit of Dowerin indicates that the picture sent by petitioner depicts the juvenile orally copulating petitioner].

"I think I can trust you since cops don't send pixs of young girls, but I'll have to know more about you before I can send anything good . . . .

You can make cheap copies of polaroids from a Super Shooter which has an attachment for making copies. It's better

than trying to send them in somewhere that you're not sure about. It's a good idea to have your own photolab, but its so expensive . . . ."

In the light of the foregoing evidence, this court holds that petitioner's contention that ineffectiveness of petitioner's counsel is shown by said counsel's failure to attack the legal basis for the issuance of the search warrant, is without merit.

(b) Petitioner next contends that trial counsel was ineffective because he failed to conduct discovery regarding the extensive correspondence between petitioner and Officer Dowerin, and to offer such correspondence into evidene with respect to the defense of entrapment.

In considering the foregoing contention, it is necessary to review the

evidentiary posture of this case in the trial court.

The evidence against petitioner, received during trial, consisted of seven polaroid photographs (exhs. 2a to 2g, inclusive, found in a photo album in an attache case, in the attic of the house occupied by petitioner. In addition, People's exhibit 3 was a polaroid "Super Shooter" camera with an attachment for making copies. The manufacturer's coding on the back of People's exhibits 2a, 2b, and 2c, according to the People's evidence, indicated that said film had been manufactued in February, 1983. The manufacturer's coding on the back of People's exhibits 2d, 2e, 2f, and 2g indicated, according to the People's evidence, that said film had been manufactured in April, 1983. The People's evidence further indicated that inside

the polaroid "Super Shooter" camera with the attachment for making copies, was film containing manufacturer's code number "D3077817" and that the same code marking appeared on the four polaroid photographs marked as People's 2d through 2g, inclusive.

After he testified that the age of the children appearing in People's exhibits 2a through 2c, inclusive, was approximately eight to ten years of age, Officer Dowerin described the photographs, as follows:

> "2a and 2c was a child which is completely nude with the legs spread apart and the second child is wearing a dress with no panties where it shows her vagina area. People's 2b depicts a male adult penis touching the vagina with what appears to be a female juvenile

under the age of 14."

Officer Dowerin testified as follows, with respect to the polaroid photographs referred to as People's 2d, e, f, and g:

> "2d depicts a male adult penis close to or touching the mouth of what appears to be a female juvenile under the age of fourteen and there appears to be white liquid around the child's mouth."
>
> "2e depicts a female child under the age of ten wearing [what] looks like a skirt and blouse but no underwear, her legs are spread apart and hands are on her vagina. I am aware of who this child is based upon prior investigation."
>
> "2f is a picture of a female approximately four to five years of age wearing a dress but no underwear

and the vagina is shown, again, this is the same child as in 2c but at a younger age."

"2g, two female juveniles approximately eight years of age, one female juvenile was holding some type of object in the vagina of the second child and touching her vagina with her hands."

Officer Dowerin further testified that 2b, 2c, and 2f were in existence in 1977, and were implicated in the investigation of petitioner which had occurred during that year. Officer Dowerin was unable to date the remaining four polaroid pictures received in evidence, beyond testifying as to the date of manufacture of the polaroid film on which they appeared.

Officer Dowerin was unable to testify as to who reproduced the seven

pictures and could not say any more than that they had been reproduced in 1983.

From the foregoing factual recital, it is obvious that the People's case against petitioner was based upon circumstantial evidence. Although the polaroid "Super Shooter" camera with the attachment for making copies, and the seven pictures were located on petitioner's premises, the People could not specifically prove who had made the reproductions, but relied on circumstantial evidence that petitioner had done so, in the light of his opportunity and proclivity.

In his own defense, although petitioner acknowledged that he was the owner of the polaroid "Super Shooter" camera with the attachment for making copies, and also acknowledged, on cross-examination, that he had told Officer Dowerin

that it is inexpensive to make copies of polaroids if you had a "Super Shooter" attachment, petitioner specifically denied that he had reproduced the seven photographs, and contended that they were pictures he had had since 1977, and that he had already been punished relative thereto.

Realizing that petitioner's denial obviously hinged upon his credibility, and realizing further that the defense of denial was weakened by the fact that the polaroid film bore data indicating that it had been manufactured in 1983, and, thus, the reproductions had to have been made between the date of manufacture, that is, February or April 1983, and the date of arrest, July 19, 1983, counsel for petitioner placed major emphasis upon

the defense of entrapment.[1]

In his supplemental petitioner before this court, petitioner argues:

"As to the defense of entrapment, it is clear that there was extensive written correspondence betweens (sic) the police officer [Officer Dowerin] and petitioner. Trial counsel did not offer any copies of any such correspondence in evidence or, as nearly as can be ascertained, did

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[1]The defense of entrapment was appropriate even though petitioner denied committing the criminal acts charged. In People v. Perez (1965) 62 Cal.2d 769, at pp. 775-776, the California Supreme Court held: "A defendant, for example, may deny that he committed every element of the crime charged, yet properly allege that such acts as he did commit were induced by law enforcement officers. . . To compel a defendant to admit guilt as a condition to invoking the defense of entrapment would compel him to relieve the prosecution of its burden of proving his guilt beyond a reasonable doubt at the risk of not being able to meet his burden of proving entrapment. To put the defendant in that dilemma would frustrate the assertion of the defense itself and would thus undermine its policy . . . ."

counsel even seek to discover such correspondence. Adequate representation, at a minimum, implies at least sufficient investigation to mount a credible defense, ..."

However, on the record before this court, it cannot be held, as a matter of law, that petitioner's entrapment defense failed because of his counsel's alleged inadequate investigation, discovery, and/or utilization of the correspondence between pettioner and Officer Dowerin, in his various undercover identities. Petitioner chose not to produce trial counsel at the hearing before this court on April 17, 1986, in order that he might give testimony concerning his professional determinations relative to the correspondence between petitioner and Dowerin. Without the testimony of trial counsel, and in view of the absence of

any record here with respect to the correspondence itself, this court cannot infer that there was not an entirely reasonable basis for trial counsel's conduct relative to the correspondence, and must reject petitioner's assertions of incompetency of counsel on such grounds.[2] (See People v. Pope (1979) 23 Cal.2d 412, 428.)

II.

Petitioner next contends that he was deprived of effective representation of counsel, by reason of the fact that Penal Code section 311.3, subdivision (a) is unconstitutional, both facially, and as applied, in that it prohibits possession of the materials referred to therein, in

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[2]For the same reason, this court rejects petitioner's suggestion that trial counsel was incompetent in trying the case before the court, instead of before a jury.

the privacy of one's own home, and thus contravenes the First and Fourteenth Amendments of the Constitution of the United States, and that his trial and appellate counsel did not so assert.

In the supplemental petition for writ of habeas corpus, petitioner contends, in pertinent part, as follows:

" . . . Petitioner acknowledges that so-called 'kiddie porn' or depictions of children in a sexual context is not entitled to constitutional protection under the First Amendment, New York v. Ferber (1982) 458 U.S. 747, 764, 102 S.Ct. 3348, 3358, indeed, the state is relieved of establishing that the material is even obscene, id. Ferber, however, dealt with the proprietor of a bookstore engaged in the promotion, dissemination, or distribution of depictions of a sexual performance by a child,

New York Penal Law, Article 263; §§ 263.10 and 263.15. (Cf. California Penal Code § 311.4.) In the instant case, the crime allegedly committed by the petitioner was, apparently, the use of a "Super-Shooter" to make photographs of photographs which were already in existence. No evidence was presented, nor under the statute need it be presented, that petitioner had any intention other than the preparation of duplicates for his own use. As such, the statute is overbroad in that it effectively prohibits the mere possession of such materials. Petitioner asserts that the possession of even obscene materials in the privacy of one's own home is not contrary to law, Bloom v. Municipal Court for Inglewood Judicial District (1976) 16 Cal.3d 71, 81, . . . Stanley v. Georgia (1969) 394 U.S. 557, 89 S.Ct. 1243."

This court rejects petitioner's position as untenable.

While it is true that in Ferber, the Supreme Court upheld a New York statute which prohibits persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicts such a performance, the court also recognized that "In recent years, the exploitive use of children in production of pornography has become a serious national problem.[1] The Federal Government and 47 States have sought to combat the problem with statutes specifically directed at the production of child pornography. At least half of such statutes do not require that the materials produced be legally obscene[2]. Thirty-five States and the United States Congress have also passed legislation prohibiting the distribution of such

materials; 20 States prohibit the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene[2].[3] (102 S.Ct. 3348, 3350-3351.) (Emphasis added.)

The Supreme Court while recognizing that laws directed at the dissemination of child pornography run the risk of suppressing protected expression by "allowing the hand of the censor to become unduly heavy," concluded " . . . that the States are entitled to greater leeway in he (sic) regulation of pornographic depictions of children . . . " in that "It is evident beyond the need for

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[3] In footnote 1, set forth in the foregoing quoted portion, the Supreme Court states, quoting hearings before the Subcommittee on Select Education of the House Committee on Education and Labor 95th Cong. (1977) that "In Los Angeles alone, police reported that 30,000 children have been sexually exploited."

elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling' . . . . 'A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens' . . . ." (Id., at p. 3354.)

"The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." (Id., at p. 3355.)

The Supreme Court clearly recognizes that the suppression of child pornography requires a legislative scheme that attacks both the production and the distribution of such materials. The court stated: "Suffice it to say that virtually all of the States and the United States have passed legislation proscribing the production of or other-

wise combating 'child pornography.' The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.[9] That judgment, we think, easily passes muster under the First Amendment." (Id., at p. 3355.) (Emphasis added.)

The Supreme Court stated, in Ferber, at page 3357 that "The value of permitting . . . photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis . . . ." (Emphasis added.)

The Supreme Court further held, at page 3358 that "When a definable class of material [child pornography] bears so heavily and pervasively on the welfare of children engaged in its production, we

think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment."

The Court went on to state, at page 3358: "There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of 'sexual conduct' proscribed must also be suitably limited and described."

The Supreme Court further stated, at page 3361: "The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then 'only as a last resort . . . .' We have, in consequence, insisted that the overbreadth involved be 'substantial' before the statute involved will be invalidated on its face."

Mindful of the foregoing guidelines laid down by the United States Supreme Court, in Ferber, we proceed to evaluate

Penal Code section 311.3, under which petitioner was prosecuted.[4]

Penal Code section 311.3 proscribing the sexual exploitation of a child by reproducing pictures of a child engaged in sexual conduct, is part of a statutory scheme for the protection of children, which includes Penal Code section 288, proscribing lewd or lascivious acts with a child under 14 years of age, Penal Code section 266(j), proscribing the making of a child under the age of 14 available for or persuading such a child to engage in a lewd act, Penal Code 311.2, (sic) proscribing distribution or exhibition of obscene matter relating to minors, Penal Code section 311.4, proscribing employ-

---

[4]Neither citation by counsel nor the independent research of this court, indicates the existence of a California appellate opinion interpreting the statute at bench.

ment of a minor for the sale or distribution of obscene matter or the production of pornography, and Penal Code section 311.10, proscribing the advertisement of obscene matter depicting minors.

Penal Code section 311.3 imposes criminal responsibility on all persons who knowingly develop, duplicate, print, or exchange any film, photograph, videotape, negative, or slide showing a person under the age of 14 engaged in any act of sexual conduct.[5]

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[5]Penal Code section 311.3, subdivision (b) defines sexual conduct as (1) all sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, between persons of the same or opposite sex or between humans and animals, (2) penetration of the vagina or rectum by any object, (3) masturbation or sado-masochistic (sic) abuse for the sexual stimulation of the viewer, or (4) exhibition of the genitals, pubic, or rectal area or defecation or urination for the sexual stimulation of the viewer.

However, Penal Code section 311.3

(Continued to next page)

Petitioner argues that "he . . . was convicted of nothing more than the duplication of photographs which he retained for his own purposes in a scrapbook in the privacy of his home." He contends that while he would not have the right to possess such materials with intent to sell or exhibit them or to actually sell or exhibit them to others (see Pen. Code, § 311.2, subds. (a), (b),

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Footnote 5 continued

does not subject any legal agency in the investigation of a criminal offense or any person involved in legitimate medical, scientific, educational, or lawful spousal activity to the described prohibitions. (See Pen. Code, § 311.3, subd. (c).)

Furthermore, any employee of a commercial film developer acting in accordance with the instructions of an employer within the scope of employment and having no financial interest in the commercial developer by which he is employed will not be subject to conviction under Penal Code section 311.3, for sexual exploitation of a minor. (See Pen. Code, § 311.3, subd. (e).)

(c), and (d)), the receipt or possession of the materials at bench in the privacy of his own home is constitutionally protected.

This court points out that petitioner was not convicted for mere possession of seven polaroid prints, but for having duplicated said prints from others depicting children engaged in sexual conduct, as hereinabove described and defined.

Although it may be argued, as petitioner does, that the state has no legitimate interest in suppressing the reproduction of pornographic photographic materials involving children, absent an intent on the part of the reproducer of such materials to distribute them, such an argument misses the point. As recognized by the Supreme Court in Ferber, a child is abused not only by the original

pornographic act which is photographed, but by virtue of the child's perceiving that a permanent record of his or her participation has been created. Emotional harm occurs because of the child's knowledge that the photographic record of his or her involvement is capable of being viewed or circulated at any subsequent time, at the will of the possessor of the photographic record. (See Ferber, supra, at pp. 3355-3356.)

The evident purpose of Penal Code section 311.3 is to protect minors from being corrupted and abused by the production and reproduction, as therein defined, of pornographic materials, as defined. As indicated, the validity of this purpose is not affected by any subjective intent which may be entertained by the accused regarding the distribution of the reproduced obscene

material. (See People v. Burrows (1968) 260 Cal.App.2d 228, 232-233.)

Based upon the reasoning of the United States Supreme Court in Ferber, supra, and in light of the legitimate reach of Penal Code section 311.3, subdivision (a), this court holds that said statute is not substantially overbroad, either facially, or as applied to petitioner in the case at bench. In so holding, this court notes that Penal Code section 311.3, subdivision (a) carefully specifies the conduct to be forbidden, and the type of sexual acts, which, if photographically depicted being performed by a child, places the material under the sanction of the statute. (See "First Amendment--Freedom of Speech--Child Pornography, Obscene or Not Possesses No First Amendment Protection--New York v. Ferber 102 S.Ct. 3348 (1982)," 23 Santa

Clara L.Rev. 675, 681, 684.)

Because Penal Code section 311.3, subdivision (a) does not violate petitioner's First Amendment rights, as applied to the State of California, through the Fourteenth Amendment, petitioner was not deprived of a meritorious defense as a result of the fact that neither his trial nor appellate counsel argued the unconstitutionality of said statute.

III.

Petitioner's third major contention is that his sentencing to two consecutive one-year terms for his two-count violation of Penal Code section 311.3, subdivision (a), which is the maximum provided for under the terms of subdivision (d) of said section, constitutes cruel and unusual punishment under the Fifth, Eighth, and Fourteenth Amendments of the

United States Constitution, and under the provisions of article I, section 17 of the Constitution of the State of California.

The gravamen of petitioner's contention is that the penalty prescribed for violation of Penal Code section 311.3, subdivision (a), set forth in Penal Code section 311.3, subdivision (d), pursuant to which he was sentenced, is allegedly heavier than the punishment set forth in Penal Code section 311.9, subdivision (b) for actual distribution, as prohibited by Penal Code section 311.2, subdivisions (c) and (d), of materials depicting a person under the age of 17 years personally engaging in or personally simulating sexual conduct, as defined in section 311.4 of the Penal Code.

This court holds that petitioner's contention is without merit. This is so

in that section 311.2, subdivisions (c) and (d) of the Penal Code, to which petitioner makes reference, were not enacted in the form to which petitioner refers, until 1984, which was subsequent to the date on which petitioner was sentenced, namely, October 12, 1983.

At the time of petitioner's sentencing, the only section of Penal Code section 311.2 to which Penal Code section 311.9 pertained was Penal Code section 311.2, subdivision (a), which did not, as it does now, involve the subject of child pornography. Penal Code section 311.2, subdivision (b) pertained, at the time of petitioner's sentencing, as it does now, to the subject matter of commercial distribution of child pornography, which was defined as a felony, as is presently the case, although under current law the

punishment is more severe.6

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[6]Parenthetically, this court notes that the provisions for punishment for violations of Penal Code section 311.2, subdivisions (c) and (d), are contained within said subdivisions. Thus, subdivision (c), which proscribes distribution of materials depicting a person under the age of 17 years personally engaging in or personally simulating sexual conduct, as defined in section 311.4 of the Penal Code, to a person 18 years of age or older, provides for misdemeanor punishment by imprisonment in the county jail for up to one year, or by a fine not exceeding $2,000.00, or by both such fine and imprisonment. [This is the same punishment provided for violation of Pen. Code, § 311.3.] Similarly, subdivision (d), which proscribes distribution of materials depicting a person under the age of 17 years personally engaging in or personally simulating sexual conduct, as defined in section 311.4 of the Penal Code, to a person under 18 years of age, provides for felony punishment. The punishment for violations of Penal Code section 311.2, subdivisions (c) and (d) are clearly not governed by the provisions of Penal Code section 311.9, subdivision (a), as suggested by petitioner. This is so, in view of the fact that Penal Code section 311.2, subdivisions (c) and (d), which define both crime and punishment, respectively, were enacted, in the form to which petitioner refers, in 1984. Penal Code section 311.9, subdivision (a) was last amended in 1977. Under generally accepted rules

Because of our determination that petitioner's contention that his sentencing was cruel and unusual, by reason of disproportionality, is erroneous, his suggestion that he was the recipient of inadequate legal counsel because of his attorney's failure to argue such alleged disproportionality in sentencing, must be rejected.

Footnote 6 continued

of statutory construction, in the case of apparent conflict between code sections passed at different times, the section enacted later in point of time controls. (See Coker v. Superior Court (1945) 70 Cal.App.2d 199.) See, also, Code Civ. Proc. § 1859, which provides as follows: "In the construction of a statute the intention of the Legislature, . . . is to be pursued, if possible; and when a general and [a] particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it."

For all of the foregoing reasons, this court denies petitioner's application for a writ of habeas corpus.[7]

/s/ Barnet M. Cooperman
Judge of the Superior Court

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[7]This court notes that petitioner has made the contention that by reason of ineffectiveness of counsel, he has received multiple punishment for the same offense. No points or authorities have been submitted on behalf of petitioner in support of the foregoing contention. This court has examined the sentencing imposed upon petitioner, and has concluded that on the facts of the case at bench, the sentencing imposed upon petitioner is not violative of Penal Code section 654. Accordingly, no ineffectiveness of counsel or the withdrawal of any viable defense, is identified in connection with this contention of petitioner.

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re	) 2d Civ. No. B 022 283
JOHN ROBERT DUNCAN,	) (Super. Ct. No. APHC 000 554)
on	) (Barnet M. Cooperman, Judge)
Habeas Corpus.	) (Mun. Ct. No. M 98758, SE South Jud. Dist.) (John R. Hopson, Judge)

O R D E R

THE COURT:

The petition for writ of habeas corpus, filed August 8, 1986, has been read and considered.

It appearing that transfer of the cause to this court is necessary in order to settle important questions of law:

(Court of Appeal, Second Dist., Filed August 21, 1986, Clay Robbins, Jr., Clerk.)

IT IS ORDERED that the cause be transferred to this court for hearing and decision.

IT IS FURTHER ORDERED that the cause be placed on the calendar of Division III of this court for oral argument on November 19, 1986, at 9:00 a.m.

The clerk of this court is directed to order the complete record of the municipal and superior court proceedings and to comply with the provisions of California Rules of Court, rule 62(e).

Counsel for the People may file and serve a response to the petition on or before September 22, 1986.

Any reply shall be filed and served no later than October 1, 1986.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
CLAY ROBBINS, JR., CLERK

DIVISION: 3 DATE: 08/21/86

B022283

Charles Downing
666 East Ocean Blvd.
Long Beach, CA 90802

RE: Duncan, John Robert
vs.
S.c.l.a.
In re John Robert Duncan On Habeas Corpus
2 Civil B022283
Los Angeles No. M98758

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
CLAY ROBBINS, JR., CLERK

DIVISION: 3 DATE: 03/30/87

B022283

Charles Downing
980 Atlantic Ave.
2nd Floor
Long Beach, CA 90813

RE: Duncan, John Robert
vs.
S.c.l.a.
In Re John Robert Duncan on Habeas Corpus
2 Civil B022283
Los Angeles NO. M98758

3/30/87 The Court:
Petition for rehearing denied.

O R D E R D E N Y I N G R E V I E W

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 3, No. B022283
S000599

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

IN RE JOHN ROBERT DUNCAN

on

HABEAS CORPUS

Petition for review DENIED.

/s/ LUCAS
Chief Justice

(Supreme Court, Filed June 25, 1987, Laurence P. Gill, Clerk, Deputy)

COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FOR THE SECOND APPELLATE DISTRICT

DIVISION: 3

Charles Downing
980 Atlantic Ave.
2nd Floor
Long Beach, CA 90813

Re: Duncan, John Robert
vs.
S.c.l.a.
In Re John Robert Duncan on Habeas Corpus
2 Civil B022283
Los Angeles NO. M98758

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 03/03/87 is now final.

Petition Summarily Denied By Opinion.

__Appellant__Respondent to recover costs.
__Each party to bear own costs.
_XCosts are not awarded in this proceeding.

July 13, 1987
Clay Robbins, Jr., Clerk

By:
Deputy Clerk

Charles Downing, Esq.
980 Atlantic Avenue
Long Beach, CA 90813
Telephone: (213) 432-3941

Attorney for Defendant/Petitioner

MUNICIPAL COURT OF THE SOUTHEAST/SOUTH JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. JOHN ROBERT DUNCAN, Defendant.	NO. M98758
In re JOHN ROBERT DUNCAN, On Habeas Corpus.	2d Civ. B022283 (Super. Ct. No. APHC 000554)
JOHN ROBERT DUNCAN, Petitioner, vs. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, Respondent, THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	TIME WAIVER BY DEFENDANT AND PETITIONER

(Filed Municipal Court Southeast/South District, 87 August-6 A8:52, Southgate Branch, Joe Sharar, Clerk)

Defendant and Petitioner, JOHN R. DUNCAN, by and through his attorney, CHARLES DOWNING, represented to the court that he is preparing a Petition for Writ of Certiorari to the Supreme Court of the United States and, accordingly, requests this court to stay its proceedings relative to execution of sentence until such time as the matter is finally resolved by action of the Supreme Court.

Defendant and petitioner hereby expressly waives any statutory right or right conferred by the Constitutions of the State of California or the United States relating to the time of further proceedings associated with the execution of sentence in the above-entitled case and further agrees to a continuance of the matter until final action is taken upon his Petition for Writ of Certiorari

to the United States Supreme Court.

Dated: July 31, 1987

/s/ JOHN ROBERT DUNCAN
JOHN R. DUNCAN, Defendant and Petitioner

/s/ CHARLES DOWNING
CHARLES DOWNING, Attorney for JOHN R. DUNCAN, Defendant and Petitioner

GOOD CAUSE APPEARING THEREFOR, it is hereby ordered that the proceedings on the remittitur in the above-entitled case can be continued to September 22, 1987, unless by said date a Petition for Writ of Certiorari has been filed, in which case the proceedings will be further stayed until final action is taken by the United States Supreme Court.

/s/ John R. Hopson
JOHN R. HOPSON, Judge of the Municipal Court

(County of Los Angeles, State of California, I certify that this is a true, correct, and complete copy of the original record in my custody, Dated: August 12, 1987, (SEAL) Joe Sharar, Clerk, Municipal Court of the Southeast Judicial District, By P. Benjamin, Deputy)

NO. 87-312

COPY

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOHN ROBERT DUNCAN,

Petitioner,

v.

CALIFORNIA,

Respondent.

BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

IRA REINER
District Attorney of the
County of Los Angeles

HARRY B. SONDHEIM
Head Deputy
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INTRODUCTION

We accept as adequate petitioner's formulation of the questions presented for review because petitioner was charged with and convicted under a child pornography statute [1] which did not include among its elements the intent to distribute or display the material to other persons. We also accept as adequate petitioner's statement of the case (including the statement of facts) with one reservation. Petitioner complains that California Penal Code section 311.3, subdivision (a), made "criminal the act of the duplication of existing child pornographic material entirely within the limits of his own home

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1. The term "child pornography" is used herein to pertain to photographs or films depicting sexual conduct by children.

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and without the intent to distribute or display such materials or duplicates to any other persons." (Petition, p. 2.) No evidence was presented, at the trial, nor under the statute need it have been presented, that petitioner had any intention other than the preparation of duplicates for his own use. This is a far cry from saying that, as a matter of fact, petitioner had no intent to distribute or display the material to other persons. The contrary is suggested by the contents of a letter attached to the search warrant described in the superior court's memorandum of decision. (Appendix C to petition, pp. 8-10.) Moreover, although the circumstantial evidence supports the conclusion that petitioner's duplication of the offending material took place within his home, the statute under which

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he was charged and convicted is applicable to any act of duplication of child pornography, without limitation as to the situs of the act.

SUMMARY OF ARGUMENT

Assuming arguendo that the constitutional right to privacy embraces the mere private possession of child pornography, the duplication of child pornography, with or without an intent to distribute or display the same to others persons, is not similarly protected because the police power constitutionally extends to both the distribution and production of child pornography. Moreover, the right to merely possess child pornography, assuming arguendo it is of constitutional dimension, does not create the correlative

EDITOR'S NOTE

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right to acquire child pornography. The duplication of child pornography is a species of its production and a mode of its acquisition.

ARGUMENT

A STATUTE WHICH CRIMINALIZES THE DUPLICATION OF CHILD PORNOGRAPHY DOES NOT VIOLATE THE FEDERAL CONSTITUTIONAL RIGHT OF PRIVACY

Petitioner's argument is essentially as follows: The state cannot constitutionally proscribe the mere possession of child pornography in the privacy of one's home. If such mere possession of child pornography is encompassed within the constitutional right of privacy, the duplication of a photograph without the

intent to distribute or display it to another person is similarly protected. As we shall see, this argument is fundamentally fallacious.

In Stanley v. Georgia, 394 U.S. 557 (1969), this Court held that the mere possession of obscene matter, in the privacy of one's home, cannot be made criminally punishable under the Constitution. Whether grounded upon the right to privacy (United States v. 12,200-Ft. Reels, 413 U.S. 123, 126 (1972)) or the First Amendment (Bowers v. Harwick, 478 U.S. __, 106 S.Ct. 2841, 2846 (1986), the right to merely possess matter within the privacy of one's home is not without limitation. Thus in Stanley this Court cautioned that there was no intention "to express any opinion on statutes making criminal possession of other types of

printed, filmed, or recorded materials. . . . In such cases, compelling reasons may exist for overriding the right of the [individual to possess those materials." (394 U.S. at 568 n. 11.)

In New York v. Ferber, 458 U.S. 747 (1982) this Court upheld a New York statute which prohibits the knowing promotion of sexual performances by children under 16 years of age by the distribution of films depicting young boys masturbating. This statute was deemed not to forbidden by the First Amendment even though the prohibited material need not be legally obscene. Although this Court focused its discussion in Ferber on the distribution of child pornography, the constitutional power to prohibit distribution was in part grounded upon the insufficiency of efforts to halt the

production of such pornography. Besides noting that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation," this Court asserted that "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." (458 U.S. at 759.) The production and distribution of child pornography were equally regarded in Ferber to be within the scope of constitutionally valid police powers.

Petitioner's point is that the constitutional right, grounded upon Stanley, to merely possess obscene matter in the privacy of one's house is broad enough to encompass the right to merely

possess child pornography in the privacy of one's home. However, the evils associated with child pornography, which justifies this Court's holding in Ferber, that a child pornography statute is valid albeit the material is not required to be legally obscene, are sufficiently serious and distinct so as to justify the conclusion that a statute prohibiting the mere possession of child pornography, even in the privacy of the home, is not facially invalid. Such indeed is the holding in Ohio v. Meadows 28 Ohio St.3d 43, 503 N.E.2d 697 (1986) (cert. den. __ U.S. ___, 107 S.Ct. 1581 (1987)). But the issue of the validity of such a statute is not before this Court in the instant case. Petitioner was not charged and convicted of mere possession of child pornography. Rather, he was charged and convicted of

having violated California Penal Code section 311.3, subdivision (a), which makes it a criminal offense (i.e., sexual exploitation of a child) for anyone to "knowingly develop, duplicate, print, or exchange any film, photograph, video tape, negative, or slide in which a person under the age of 14 years engaged in an act of sexual conduct."

Of course, if the mere private possession of child pornography can be criminally punishable under the Constitution, it follows that the mere duplication of such material, albeit in the privacy of the home, can also be criminally punishable under the Constitution. But as the Court of Appeal of the State of California observed in the instant case: "we are not dealing with the 'mere possession of obscene materials' protected by the First

Amendment, but with the reproduction of child pornography, the control of which is subject to different constitutional limitations." (In re Duncan, 189 Cal. App.3d 1348, 1357, 234 Cal.Rptr. 877 (1987).) Assuming arguendo that no reasons are compelling enough to constitutionally justify a statute criminalizing the mere private possession of child pornography, it does not follow that such reasons are insufficient to constitutionally justify a statute criminalizing the mere private duplication of child pornography.

In the first place, as we have seen, this Court's opinion in Ferber justified a statute prohibiting the distribution of child pornography because of the factual inadequacy of criminalization limited to the production of such material in order

to prevent the sexual exploitation of children. Hence, Ferber must itself be understood as indicating that a statute which prohibits the mere production of child pornography (including the reproduction of such material) is constitutionally valid, whether or not the intent to distribute or to display to another can be proven, in order to prevent sexual exploitation of children. As the superior court observed in its memorandum of decision (Appendix C to Petition, pp. 31-32): "[A] child is abused not only by the original pornographic act which is photographed, but by virtue of the child's perceiving that a permanent record of his or her participation has been created. Emotional harm occurs because of the child's knowledge that the photographic record of his or her involvement is

capable of being viewed or circulated at any subsequent time, at the will of the possessor of the photographic record." The developing or duplication of child pornography are aspects of its production.

In the second place, this Court has itself declared that the constitutional right to merely possess obscene material in the privacy of one's home does not entail a correlative right to acquire or import such material. (United States v. 12,200-Ft. Reels, supra, 413 U.S. at 127.) Thus, the government may constitutionally prohibit the importation of obscene material even though the importer claims that such material is for private, personal use and possession only. This Court was also "note[d] that it is extremely difficult to control the uses to which obscene material is put once it

enters this country. Even single copies represented to be for personal use, can be quickly and cheaply duplicated by modern technology thus facilitating wide-scale distribution." (413 U.S. at 129.) Similar considerations justify the statutory proscription of the reproduction of child pornography, albeit for only the personal use of the possessor. Clearly, a statute which includes the intent to distribute or display as an element of the offense of duplicating child pornography would not be as efficacious as one in which that element is absent. Otherwise the requisite intent in a given case might be difficult to prove beyond a reasonable doubt, although one could be certain beyond a reasonable doubt the reproductions of child pornography will tend to circulate.

As this Court has distinguished mere private possession of obscene matter from the acquisition of such material, albeit for private use only, surely, the same should be done with respect to child pornography. Duplication of child pornography is a species of acquisition of such material.

CONCLUSION

Interestingly enough, "[p]etitioner willingly concedes that the materials he duplicated are not entitled to First Amendment protection and further concedes that the act of making photographic duplicates of such materials is not protected by the Constitution as a form of free speech or expression." (Petition, p. 20.) This concession makes shipwreck of

his argument since Stanley is considered by petitioner as a right-to-privacy case. But the right to merely possess obscene matter in the privacy of the home has been most recently explained by this Court to rest upon First Amendment considerations alone. (Bowers v. Harwick, supra, __ U.S. at __, 106 S.Ct. at 2846.) Assuming that Stanley is properly considered as a right-to-privacy case, the compelling interest of the State in the suppression of the sexual exploitation of children justifies a statute which prohibits the production or reproduction of child pornography. The constitutional right to merely possess child pornography in the privacy of the home, assuming arguendo there is such a right, could be arguably regarded as justified by overriding privacy interests pertaining to what is essentially passive

conduct (i.e., mere possession), as distinguished from essentially active conduct, such as the acquisition, production, or reproduction of child pornography. The fallacy of petitioner's argument, that the right to privacy extends to the right to merely duplicate child pornography if it initially extend to mere possession, has been anticipatorily exposed in United States v. 12,200-Ft. Reels, supra, as follows:

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded

> it, although the aggregate or end result is one that would never have seriously been considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.' Perspectives may change, but our conclusion in Stanley represents such a line of demarcation; and it is not unreasonable to assume that had it not been so delineated, Stanley would not be the law today.

(413 U.S. at 127. Footnote omitted.) It is submitted that this Court need not wait until third, fourth, or fifth "logical"

extension of Stanley is presented for its consideration. The illicit process can be arrested at the first proposed logical extension as presented in this case. The petition for certiorari should be therefore be denied.

Respectfully submitted,

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By

HARRY B. SONDHEIM
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Attorney for Respondent